No. _____

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Stanley Williams,
Petitioner

v.

S.W. ORONZKI, Warden, San Quentin
State Prison, San Quentin, California.
Respondent.

APPLICATION PURSUANT TO 28 U.S.C. § 2244(b) TO FILE

SUCCESSOR PETITION FOR WRIT OF HABEAS CORPUS

AND REQUEST FOR STAY OF EXECUTION

DEATH PENALTY CASE - EXECUTION IMMINENT

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APPLICATION PURSUANT TO 28 U.S.C. § 2244(b) TO FILE SUCCESSOR PETITION FOR WRIT OF HABEAS CORPUS AND REQUEST FOR STAY OF EXECUTION

Stanley Williams, by and through his attorney Verna Wefald, respectfully moves this Court for permission to file a successor petition for writ of habeas corpus under 28 U.S. C. §§ 2244 (d) and 2254. Mr. Williams is scheduled to be executed by the State of California at 12:01 a.m. December 13, 2005. He is actually innocent of the crimes for which he was convicted. This Court has acknowledged that the that the evidence of guilt was based on "circumstantial evidence and the testimony of witnesses with less-than-clean backgrounds and incentives to lie in order to obtain

leniency from the state in either charging or sentencing." Williams v. Woodford, 384 F.3d 567, 624 (2004) .[1]

Petitioner is now able to demonstrate numerous Brady and Giglio violations. They include that, through a probation officer's report, prepared in September, 1981, and filed in the Los Angeles Superior Court, contrary this Court's conclusion when it denied Petitioner's appeal 2002, key prosecution witness Garrett did indeed have a deal with the prosecution. (Exhibit 374) Along with other points, this significant evidence critically undermines this Court's factual finding, demonstrates the ongoing prosecution violations of Brady and Giglio, and requires relief from this Court.

I. PETITIONER'S CONVICTION RESTS ON THE TESTIMONY OF CRIMINAL INFORMANTS WITH INCENTIVES TO LIE AND HIS TRIAL PROSECUTOR WAS FOUND TO BE DISHONEST BY TWO UNANIMOUS CALIFORNIA SUPREME COURTS

This application is based, inter alia, on the recent discovery of exculpatory evidence which was suppressed by the prosecution. Unfortunately this is not entirely surprising since the prosecutor in question, Los Angeles County Deputy District

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[1] In support of this motion, Petitioner relies upon all files and records in this Court concerning Petitioner, including approximately 1,462 pages of Exhibits he transmitted to this Court in recent days (including on CD-Rom), which are cited herein as "Exhibits" with the accompanying citation indicating the specific page therein relied upon. He also relies upon the "Supplemental Exhibits" submitted to this Court in recent days, an approximate 250 pages, cited herein as "SE" followed by a page reference.

Attorney Robert Martin has twice been found by a unanimous California Supreme Court to be dishonest. People v. Fuentes, 54 Cal.3d 707, 720 (1991) ; People v. Turner, 42 Cal.3d 711 (1986). Under the recent U.S. Supreme Court decision in Banks v. Dretke, 540 U.S. 608 (2004), the requested relief is appropriate so that the prosecution can discharge its duty to "set the record straight." 540 U.S. at 676.

Due to suppression of exculpatory evidence, Petitioner was unable to properly challenge the credibility and motive of the criminal witnesses against him, or even to properly investigate the roles those witnesses may have played in the crimes.[2] The suppression of this exculpatory evidence prevented Petitioner from showing that the prosecution's case rested on a substandard police investigation. Kyles v. Whitley, 514 U.S. 419, 442, 446 (1995).

In particular, the suppression of exculpatory evidence prevented Petitioner from being able to mount a defense that the primary prosecution witnesses, James Garrett and Alfred Coward, were the true killers and that they falsely accused Petitioner in order to deflect suspicion away from themselves. Petitioner's case parallels the facts presented in Kyles v. Whitley. There, the United States Supreme Court found that if the exculpatory evidence not been suppressed, the jury:

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[2] As will be seen below, after testifying against Petitioner, both James Garrett and Alfred Coward continued to commit violent crimes but were treated in an extraordinarily lenient fashion by the District Attorney's Office.

> would have been entitled to find ¶ (a) that **the investigation was limited by the police's uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent .... and whose own behavior was enough to raise suspicions of guilt**; ¶ (b) that the **lead police detective who testified was either less than candid or less than fully informed**; and (c) that **the informant's behavior raised suspicions that he had planted ...** [the] murder weapon.

514 U.S. at 453 (emphasis added.)

II. THIS SECOND OR SUCCESSIVE PETITION SHOWS A CLAIM OF ACTUAL INNOCENCE THAT COULD NOT HAVE BEEN DISCOVERED PREVIOUSLY THROUGH THE EXERCISE OF DUE DILIGENCE

To gain leave to file this successor petition under 28 U.S.C. § 2244, Petitioner must show he has proceeded with due diligence. Here Petitioner makes this showing in two ways. First, the prosecution has long suppressed and continues to suppress exculpatory evidence. At any stage of the proceedings, the prosecution has a duty first and foremost to "set the record straight." Banks v. Dretke, 540 U.S. 668, 676 (2004) Second, if this Court should somehow disagree that Banks v. Dretke does not apply in this situation, then this Court must candidly address its role in impeding Petitioner's ability to present these claims in a timely fashion. This Court's public documents reflect that Petitioner repeatedly asked this Court to appoint competent counsel to represent him in his habeas proceedings, and to investigate and present his

claims of innocence. This Court ultimately did relieve the Federal Public Defender's Office, but not until after the panel decision denying him relief was handed down. New counsel only stepped in to handle the petition for rehearing en banc and the petition for writ of certiorari. This Court's repeated, unjustified, delays in granting Petitioner new counsel gutted his chances in the original petition.

Banks v. Dretke

In Banks v. Dretke, the state withheld evidence that would have "allowed Banks to discredit two essential prosecution witnesses." (540 U.S. at 675) Banks, a man with no prior criminal record, was sentenced to death for the murder of a 16 year old boy in Texas. (Id. at 676) The State did not disclose that one of the witnesses was a paid police informant and that the other one had been extensively coached by prosecutors and police officers prior to taking the witness stand. In addition, the State "raised no red flag," when the informant testified untruthfully. (Id. at 675) "Through direct appeal and collateral review proceedings, the State continued to hold secret the key witnesses' links to the police and allowed their false statements to go uncorrected." (Ibid)

Banks learned of the suppressed exculpatory evidence in federal habeas corpus proceedings. The federal circuit court found, however, that Banks had "documented his claims of prosecutorial misconduct too late and in the wrong forum." (Banks v.

Dretke, *supra*, 540 U.S. at 675) The United States Supreme Court reversed, holding:

> We reverse that judgment. **When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight**.

540 U.S. at 675-676 (emphasis added).

Given that the prosecution withheld numerous items of exculpatory evidence that prevented Petitioner from demonstrating that the prosecution's primary witnesses were the true killers who had falsely accused him in order to deflect suspicion away from themselves, it is incumbent upon the State to set the record straight.

This Court Failed to Relieve the Federal Public Defender in a Timely Fashion Even Though it Knew That His Counsel Were Not Competent to Handle a Case of this Magnitude and Were Ignoring His Claims of Innocence

If this Court should conclude that a successive petition is not justified under Banks, there is an alternative and compelling reason Petitioner should still be permitted to file a successor petition and be granted a stay pending its adjudication. Simply put, Petitioner cannot fairly be said to be responsible for the delay in the presentation of these claims. Rather, the federal courts themselves have precluded Petitioner from identifying and presenting these additional bases for relief any sooner.

These additional claims did not surface earlier due to orders made by the U.S. Court of Appeals for the Ninth Circuit, which orders repeatedly denied Petitioner's

requests for qualified habeas counsel. Where habeas counsel is appointed after judgment has been imposed, the presumption is that two attorneys will be appointed, and that "at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases." 21 U.S.C. § 848(q)(6). This minimum threshold was not satisfied here.

Petitioner's primary counsel for the duration of his federal habeas corpus proceedings was C. Renée Manes. As Federal Public Defender Maria Stratton recites in her declaration, at the time Ms Manes assumed Petitioner's representation, she had no prior capital experience, no prior criminal defense experience, no prior criminal prosecution experience, and no prior appellate experience. In short, she was utterly and completely unqualified, particularly under 21 U.S.C. § 848(q), to assume the role of Petitioner's habeas counsel.

Petitioner's complaints about his representation and requests for new counsel began surfacing before the Ninth Circuit in 2000.[3] These requests were never opposed

[3] Review of the Ninth Circuit docket readily discloses the same: the first request was made on Nov. 16, 2000. Numerous entries follow, all attesting to the persistent complaints Petitioner registered in his effort to have qualified counsel appointed. (E.g., submissions dated February 27, 2001; March 14, 2001; October 1, 2002; October 23, 2002; and October 24, 2002. The Ninth Circuit's docket which discloses these developments, as well the underlying documents which generated those entries, have all been transmitted to this Court. These materials consist of

by the Office of the Federal Public Defender; to the contrary, that Office supported the requests and ultimately presented its own motions for similar relief. The Ninth Circuit denied not only Petitioner's pro se requests, but even denied two (2) requests that Petitioner's counsel advanced. Petitioner should have been afforded new counsel at a point when he could have still sought to identify and pursue any additional claims as part of his original federal habeas petition. If done prior to the judgment on his petition having become final, Petitioner could then have sought to amend his petition with any such further issues without having to present a successor petition.[4]

If Petitioner had timely been afforded new, properly qualified counsel, the instant claims would have surfaced years ago, been presented, and no successor federal petition would have been required. The factual predicate to the instant claims is tied directly to the case file, but prior counsel, inexperienced in capital or habeas law, simply failed to detect and act on them.[5]

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approximately 250 pages, and are referred to as "SE" or "Supplemental Exhibits" in order to distinguish them from the "Exhibits" which Petitioner lodged in this Court on or about December 5, and which were provided in electronic format on or about December 7, 2005.

[4] This is true despite the fact the proceedings were at the appellate stage. Rule 15 of the Federal Rules of Civil Procedure; Dartmouth Review v. Dartmouth College, 889 F.2d 13 (1st Cir. 1989)

[5] Petitioner was one of the first, if not the first, petitioners offered representation by the newly formed Capital Habeas Unit which was created in the

The undersigned counsel, who does have capital litigation experience in the state and federal courts, was not appointed as counsel to Petitioner until after the U.S. Supreme Court denied Petitioner a writ of certiorari to review the Ninth Circuit proceedings, at which point Petitioner's first habeas petition was concluded. The undersigned counsel was first appointed by the California Supreme Court to represent Petitioner on October 21, 2005.[6] Extreme diligence has been exercised since that appointment in an effort to master the record that twenty-five (25) years of litigation has created. The claims set forth in the proposed successive petition are thus pressed as expeditiously as possible and not for purposes of delay. If these claims are not developed and given due consideration, justice will be denied.

Office of the Federal Public Defender for the Central District of California. That unit began on March 4, 1996, two months after Petitioner's case was assigned to it on January 3, 1996. (SE 114.)

[6] Counsel was approached about this matter prior to that date. Counsel is a sole practitioner. Accordingly, particularly given the magnitude of the record in this matter, it was not feasible or even possible for her to undertake the degree of review and assume the investigative and other responsibilities attendant to the proper representation of a capital petitioner in the federal courts until she received an appointment ensuring some compensation for her services. As noted, that first occurred on October 21, 2005.

1. **Petitioner was entitled by federal statute to qualified habeas counsel. If qualified counsel had been appointed, each and all of the issues presented herein would have been presented earlier, and this last-minute request would have been unnecessary. The delay is not of Petitioner's making since he has consistently tried to gain the qualified counsel to which he was entitled to review fully his matter.**

As a preliminary point, Petitioner recognizes the distinctions between the guarantee of effective assistance of counsel afforded in the direct appeal process and the lesser protections afforded to a habeas petitioner, including a capital habeas petitioner.[7] In non-capital direct appeals, an appellant does not even need to show prejudice when he can establish a complete breakdown with his counsel premised upon irreconcilable differences. Frazer v. United States, 18 F.3d 778, 781 (9th Cir. 1994); Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992) (attorney merely "stood in" during sentencing); United States v. Williams, 594 F.2d 1258, 1260 (9th Cir. 1979) (attorney-client relationship so bad that defendant elected to proceed pro se). Although a defendant is not entitled to a lawyer with whom he can, in his view, have a "meaningful attorney-client relationship," Morris v. Slappy, 461 U.S. 1, 3-4 (1983),

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[7] This includes that habeas petitioners possess no constitutional right to counsel while collaterally attacking their convictions. Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S.Ct. 1990, 1993, 95 L.Ed.2d 539 (1987). They clearly do, however, possess a statutory right to such counsel, and Congress has mandated that such counsel meet minimum qualifications, which were denied Petitioner. See Declaration of Maria Stratton regarding C. Renée Manes's lack of such qualifying experience. (SE 154)

if the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates the Sixth Amendment right to effective assistance of counsel, Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970).

The aforementioned protections may not attach to Petitioner's current proceedings, but as the U.S. Supreme Court has so frequently observed, "death is different"[8] and he must surely be offered at least some modicum of protection. Yet here not even the federal statute that sets out the minimum competency standards for counsel was respected.

An additional point merits consideration. Since the U.S. Supreme Court first noted the qualitative difference with capital cases decades before 21 U.S.C. § 848(q)

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[8] This now well-known point was first drawn sharply into focus almost forty (40) years ago in Reid v. Covert, 354 U.S. 1, 45-46 (1957), but persists in U.S. Supreme Court jurisprudence to this day. Wiggins v. Smith, 539 U.S. 510 (2003). "Members of the Supreme Court have advised us to remember that "death is different"--that "[t]he taking of life is irrevocable," so that "[i]t is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights," Reid v. Covert, 354 U.S. 1, 45-46, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (Frankfurter, J., concurring), and that "[i]n death cases doubts ... should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752, 68 S.Ct. 880, 92 L.Ed. 1055 (1948)." Hicks v. Collins, 384 F.3d 204, 229 (6th Cir. 2004). "Although it has been repeated often enough to have the ring of cliché, death is different. It is the ultimate penalty, and once carried out, it is irrevocable. A sentence of death cannot be imposed unless the defendant has been accorded the opportunity to defend himself fully; it cannot be imposed without the utmost certainty, the fundamental belief in the fairness of the result." United States v. Moussaoui, 382 F.3d 453, 489 (4th Cir. 2004) (Gregory, J., dissenting).

was enacted, it bears reflection whether, by enacting this statute, Congress may have been suggesting the Court should raise the bar for what constitutes capital representation. Petitioner suggests it should do so.

Even if only the minimal standards codified in federal law control, this record establishes that the Ninth Circuit was put on notice that Petitioner was being deprived of his statutory guarantee of qualified counsel during his capital habeas proceedings.

Under 21 U.S.C. § 848(q), indigent individuals under sentence of death, including sentences imposed by a state court as is the case here, are entitled to the appointment of counsel to assist in the pursuit of federal habeas corpus relief.[9] Where the appointment is made after judgment has been imposed, "at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of

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[9] "Section 848 is part of the Anti-Drug Abuse Act of 1998, Pub.L. No. 100-690, 102 Stat. 4181. The act provides for punishment for engaging in continuing criminal enterprises in violation of federal drug laws and provides for the imposition of the death penalty in certain cases. 21 U.S.C. § 848. The law also establishes the procedures for imposing the death penalty in federal cases and provides for counsel for financially unable defendants. Section 848(q) is entitled "Appeal in capital cases; counsel for financially unable defendants." As the court noted in King, the statute "seems directed to the appeals of death-penalty sentences in federal cases." King, 312 F.3d at 1367. However, Section 848(q)(4)(B) provides for the appointment of counsel in any proceeding under Section 2254 or Section 2255 in which the defendant is seeking to set aside a state or federal death sentence." House v. Bell, 332 F.3d 997, 999 (6th Cir. 2003). Hain v. Mullin, 324 F.3d 1146, 1149 (10th Cir. 2003).

appeals in that court in felony cases." 21 U.S.C. § 848(q)(6). Addressing a parallel provision applicable when the appointment is made before judgment, the Ninth Circuit observed:

> Among other things, subsection (5) requires that at least one attorney "have been admitted to practice in the court in which the prosecution is to be tried for not less than five years." Subsection (6) requires that at least one attorney appointed after judgment "must have been admitted to practice in the court of appeals for not less than five years."
>
> Section 848(q) does not state that the requirements it sets forth are exclusive; they are far more reasonably understood as minimum requirements for death penalty cases.

Russell v. Hug, 275 F.3d 812, 817-18 (9th Cir. 2002).

Petitioner did not receive even what the Ninth Circuit acknowledged in Russell was the minimum level of skill and his representation to which he was entitled under this federal statute. Yet he tried, repeatedly, to draw the point the attention of the Ninth Circuit; indeed, his counsel did not deny the lack of qualification and even joined Petitioner's efforts to effect a change in his counsel. See e.g., "Appellant's Motion for Substitution of Counsel, or, in the Alternative for Appointment of Independent Counsel to Determine if Defendant was Denied His Statutory Right to Qualified Counsel." (Filed in the Ninth Circuit on October 24, 2002, SE 56; see also SE 21, 29, 44, 50, 54, 56, 103)

2. **Since 2000, Petitioner has repeatedly complained to the federal courts about deficiencies in his representation.**

Petitioner's judicially documented complaints about his representation go back to November, 2000. On November 12, 2000, he wrote to Chief Judge Mary Schroeder. (SE 21) He explained therein his attempts to secure adequate representation, and expressed his dismay at the fact he had faced an ever changing stream of young lawyers, one after another quitting the then-newly formed capital habeas unit in the Office of the Federal Public Defender. (SE 23-24.)[10] Petitioner opened his complaint to Ninth Circuit Chief Judge Schroeder by observing that he had detected over 125 typographical errors in the reply brief his counsel had filed, as well as typographical errors and incomplete sentences in the opening brief. (SE 22).[11] His complaints did not stop with the poor quality of the written briefing, however.[12] He

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[10] Maria Stratton, Federal Public Defender for the district, acknowledged the numerous changes in counsel Petitioner had undergone in her motion to the Ninth Circuit that Petitioner be granted new counsel. (SE 106-08) She also acknowledges that Petitioner's primary counsel, C. Renée Manes, did not have any prior criminal, capital, habeas, or appellate experience before assuming her role as Petitioner's counsel. (SE 154)

[11] Although Respondent otherwise challenged Petitioner's entitlement to the relief he requested, she never controverted any of the facts Petitioner set before the Ninth Circuit. Nor did the Ninth Circuit make any contrary factual findings in its various orders which denied Petitioner a change in counsel. (SE 49, 102)

[12] Prior to hearing oral argument, the Ninth Circuit issued an unusual order. On April 20, 2001, the court directed Petitioner's counsel to identify "which specific

noted, and no one has ever refuted, that when he registered displeasure with such carelessness directly to Ms Manes[13] she indicated she was willing to remove herself as his counsel and he could secure new counsel; and she told him that due to reductions in funding, Petitioner could expect fewer legal visits. By order dated January 29, 2001, the Ninth Circuit directed counsel to make a response to the allegations set forth in Petitioner's pro se submission. (SE 25)

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issues decided by the district court are the subject of this appeal, using the same identification system as used by the district court" and to "specifically and individually identif[y] the pages of each brief where each issue is discussed." (SE 152) Qualified appellate counsel, indeed any reasonable counsel, would surely have winced at seeing such an order. The clear inference is that in the jumbled briefly that poorly qualified counsel had presented, replete as it was with numerous typographical errors and generally poor argumentation, the judges preparing for argument simply could not even be sure what issues Petitioner had presented and was pressing.

[13] Although Petitioner saw a procession of lawyers, all were short-timers with the exception of Ms Manes. Ms Manes was his primary counsel then and at all times Petitioner's case was in the Office of the Federal Public Defender. See generally Declaration of Maria Stratton. (SE 103, but especially ¶ 9: "During these changes, only one DFPD, Ms. Manes, remained constant as Petitioner's counsel." (SE at 106)

Counsel filed such a response on February 27, 2001.[14] Therein, counsel did not explain or otherwise address Petitioner's factual allegations. Rather, counsel joined Petitioner's request that he be afforded new counsel, reciting the view - established after conferences between Petitioner and Maria Stratton, and between Petitioner and Renée Manes - that the office's relationship with Petitioner could not be repaired and that in the interest of justice new counsel should be appointed. Significantly, Ms Stratton - a highly regarded professional well-known to the court - recited under oath in her supporting declaration: "Although my office typically takes no position on whether substitute counsel should be appointed, I do feel it necessary to advise the court that in our professional judgment, our attorney-client relationship with Mr. Williams is such that appointment of new counsel would best further the litigation,

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[14] Counsel's subsequent response was inexplicably not submitted under seal and in camera, despite the fact it addressed what were clearly confidential attorney-client matters. This left Petitioner still more vulnerable, a weakness directly and uniquely tied to his indigent status. Were he not indigent and compelled to seek representation by appointment, none of these interactions would have needed decision by the courts. They would have remained a private matter between him and his counsel. Bad enough the laundry had to be aired with the court; but the failure to seek a sealing order allowed Respondent to intercede as well. Rather than simply defer to the court in these matters of indigent representation by appointed counsel, Respondent affirmatively took a stance and objected to Petitioner's requests for relief. While the state of the record clearly permitted Respondent to do this, having done so, Respondent cannot now credibly be heard to complain if correction of this error requires according Petitioner additional time to correct it. Respondent does not have "clean hands" in this matter.

serving the interests of both the court and appellant." (SE 33) In addition, Ms Stratton was able to advise the court that two (2) properly qualified counsel had been identified and were available to accept an appointment. (Id.)

After receiving Respondent's opposition to the motion, and receiving a supplement from habeas counsel which addressed factual misstatements in Respondent's submission concerning the number and length of service of each of Petitioner's prior counsel, this Court denied Petitioner's motion. Doing so, the Court summarily characterized Petitioner's complaint as one simply concerning typographical errors in the briefing and assured him it would consider "the merits of appellant's appeal regardless of typographical errors." (SE 49) This Court subsequently denied Petitioner's appeal by published decision issued on September 10, 2002.

On October 1, 2002, Petitioner wrote Ms Stratton again, once more asking that her office be relieved, and requesting she make full disclosure to the court about his disagreement over how the matter was being handled. (SE 50) Notably, he emphasized his innocence. Further correspondence followed, in which Petitioner persisted in complaints about his representation and his desire for new counsel. (SE 54)

On October 24, 2002, Petitioner filed another pro se motion, styled "Appellant's Motion for Substitution of Counsel, or, in the Alternative for Appointment of Independent Counsel to Determine if Defendant was Denied his Statutory Right to Qualified Counsel." (SE 56)

This Court summarily denied that motion on November 6, 2002, without addressing any of its allegations or seeking any response from Petitioner's counsel. (SE 102)

Two (2) days later, counsel did respond. Not Ms Manes, but rather Ms Stratton. She moved the Ninth Circuit for an order authorizing substitution of counsel, or in the alternative, to authorize the appointment of second counsel. (SE 103) In her motion, counsel recited the numerous changes in counsel Petitioner had been forced to undergo, and affirmed much of what Petitioner had been reciting to the Ninth Circuit about the breakdown in communications between Petitioner and his counsel Ms Manes. (Id.)

Again Respondent jumped in to the fray, once more registering an objection to Petitioner's counsel's request to be relieved or to have additional counsel appointed. (SE 127)

This time, over two (2) full years after the Ninth Circuit received its first notice of the problems, it finally authorized the appointment of new counsel. In the interim,

Petitioner's appeal had been denied and a petition for rehearing had already been filed.

Counsel who were subsequently appointed acknowledge they did not review the entire record, and that they were essentially appointed for the continued pursuit of those issues already before the federal courts. (See Declaration of Gail Weinheimer, SE 150; Declaration of Andrea Asaro, SE 155) Accordingly, they were in no position to evaluate or determine whether any issues had been overlooked by predecessor counsel.

3. Habeas Counsel's Inexperience Resulted in the Loss of Two Issues Critical to Petitioner's claims of innocence.

a. Samuel Coleman's Coerced Testimony

The failure to timely relieve the Federal Public Defender and appoint qualified habeas counsel resulted in the loss of at least two issues critical to Petitioner's innocence.

First, in regard to the allegation of Samuel Coleman's coerced testimony, this Court noted that counsel did not even allege that Coleman's testimony was false. Williams v. Woodfoord, 384 F.3d 567, 593 (9th Cir. 2002). This failing was remarkable as counsel well knew Petitioner always had protested his innocence and maintained that Coleman's testimony was false.

This Court found that Coleman's testimony was not coerced in part because he had a lawyer to represent him at the trial which took place more than two (2) years after the beating. With minimal effort, counsel could have determined that respondent's allegation that Coleman had a lawyer was false. Coleman recently declared – contrary to prosecutor Robert Martin's assertions – that he does not recall retaining an attorney and does not recall having any attorney to represent him at the trial. (SE at 13) In addition, investigators for the undersigned recently spoke to Walter Gordon III, Ester Garrett's lawyer, and his father, Walter Gordon, Coleman's lawyer who appeared at the preliminary hearing. Mr. Gordon senior does not remember Coleman or even remember having anything to do with Mr. Williams' case. Most important, the trial transcript reflects that Mr. Gordon was only present at the preliminary hearing in 1979, when Coleman's immunity papers were submitted to the court. The record does not reflect that there was any lawyer representing Coleman at the time of trial.

b. James Garrett's Undisclosed Deal

This Court found that there was no undisclosed deal between James Garrett and DA Martin even though Garrett was given probation at his sentencing hearing after the judge stated he had had a long talk with Robert Martin. (384 F.3d at 597) This finding was predicate upon Martin and Garrett's lawyer having both denied there was a deal

for Garrett's pending receiving stolen property charges. Petitioner can now demonstrate their denials were false, however. Garrett himself told his probation officer in case No. A342090, that he had a deal. Garrett "related he is already on probation, has been informed that as a result of cooperation with authorities, he has made a deal wherein he is to receive county jail sentence, and possibly probation." (Exhibits at 374) The undersigned found this probation report in the files of the Federal Public Defender's Office. There was no excuse for predecessor counsel's failing to alert the district court and this Court to the fact that Garrett indeed had deal, and in particular, a deal which the prosecution has denied.

Additionally, DA Martin recently revealed to the Contra Costa Times that he had a secret arrangement with Garrett's lawyer to speak to the sentencing judge on his behalf. Martin noted that when a prosecutor tells a judge that an informant has testified truthfully "he's probably going to get some consideration." (SE 16)

For each and all of these reasons, the issues identified herein and which Petitioner now seeks to raise in a successive petition could not have been presented earlier with due diligence.

III. THE ACTUAL INNOCENCE STANDARD

Under § 2244(b)(2)(B)(ii), the petitioner must show that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient

to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. This Court should grant authorization to:

> file a second or successive application for habeas corpus if we find that he has made a prima facie case of success on the merits of such an application. By prima facie showing we understand simply a sufficient showing of possible merit to warrant a fuller exploration by the district court.

Cooper v. Calderon, 358 F.3d 1117, 1119 (9th Cir. 2004) (permission to file successive petition granted and execution stayed after Cooper presented evidence of Brady violation "This claim centers on Cooper's claim that he is innocent. No person should be executed if there is doubt about his or her guilt . . . ." Id. at 1124)

The "actual innocence" or "miscarriage of justice" gateway to overcome a procedural default is articulated in Schlup v. Delo, 513 U.S. 298 (1995). The "miscarriage of justice" exception applies in extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. *See* McCleskey v. Zant, 499 U.S. 467, 494 (1991). The miscarriage of justice exception is a judicially-created doctrine which was originally formulated to provide relief to certain classes of habeas Petitioners whose claims would otherwise be barred either because they failed to present their claims in state court and can no longer do so (procedural default) or because they already have pursued habeas relief in federal

court (successive petition/abuse of the writ). *See* Sawyer v. Whitley, 505 U.S. 333, 338-39 (1992).

> 'Actual innocence' in habeas jurisprudence refers to a means by which Petitioners can avoid certain procedural bars to having their habeas petitions considered on the merits. As described by the Supreme Court, the type of actual innocence claim asserted by Petitioner in this case 'is not itself a constitutional claim, but instead a gateway through which a habeas Petitioner must pass to have his otherwise barred constitutional claim considered on the merits.

Schlup v. Delo, 513 U.S. at 314.

"In order to pass through Schlup's gateway, and have an otherwise barred constitutional claim heard on the merits, a Petitioner must show that, in light of all the evidence, including evidence not introduced at trial, 'it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.'" Majoy v. Roe, 296 F.3d 770, 776, (9th Cir. 2002), citing Schlup, 513 U.S. at 327.) "A Petitioner need not show that he is 'actually innocent' of the crime he was convicted of committing; instead, he must show that 'a court cannot have confidence in the outcome of the trial.'" Majoy, at 776, citing Carriger v. Stewart (9th Cir. 1997) 132 F.3d 463, 477; Schlup, 513 U.S. at 316.)

> Actual innocence, of course, does not require innocence in the broad sense of having led an entirely blameless life. Indeed, Schlup's situation provides a good illustration. At the time of the crime at issue in this case, Schlup was incarcerated for an earlier offense, the sordid details of which he acknowledged in his testimony at the punishment phase of his trial.

> Such earlier criminal activity has no bearing on whether Schlup is actually innocent of Dade's murder.

Schlup v. Delo, 513 U.S. at 328, n.47.

IV. SUMMARY OF CLAIMS THAT WERE NOT PRESENTED IN A PRIOR PETITION

Under § 2244 (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed. The newly discovered evidence puts all of this case in a new light. None of the instant claims were presented in a prior petition. Individually and collectively this new evidence shows by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offenses.

Claim One.

THE PROSECUTION FAILED TO DISCLOSE THAT THE SHOTGUN EVIDENCE WAS UNRELIABLE UNDER STANDARD FIREARMS EXAMINATION TECHNIQUES

The only physical evidence purporting to link Petitioner to the crimes was his legally owned shotgun that was in the possession of James Garrett. In the presence of police, Garrett pulled the shotgun out from under his own bed and handed it to police. A sheriff's firearms examiner, James Warner, originally opined that he could not match the expended shotgun shell found at the motel crime scene with Petitioner's

gun. The prosecutor, DDA Robert Martin, who had twice been found by the California Supreme Court to be dishonest, told Warner to run the tests again. Warner did and testified that after firing the gun 18 times he found two shells which had "similar" markings.

According to David Lamagna, a scientist and firearms examiner retained by the undersigned, Warner's testimony is "junk science at best." Warner's opinion is not based on traditional firearms examination techniques employed well before 1979. Warner changed his opinion without any scientific basis for doing so.

Had a jury heard that Warner's testimony was not scientifically based, no reasonable juror would have found Petitioner guilty beyond a reasonable doubt. Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated.

Claim Two

TRIAL COUNSEL UNREASONABLY FAILED TO RETAIN HIS OWN EXPERT TO EVALUATE AND TEST THE FIREARMS EVIDENCE

Trial counsel was afforded the opportunity to conduct his own tests of the firearms evidence. He failed to seek funding to retain his own expert. On the facts of this case as known to trial counsel, this could not have been a reasonable tactical decision. Had a jury heard that Warner's testimony was not scientifically based, no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.

Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated.

Claim Three

THE PROSECUTION FAILED TO DISCLOSE SIGNIFICANT INFORMATION CONCERNING THE DEATH OF GREGORY WILBON, JAMES GARRETT'S CRIME PARTNER

James Garrett first implicated Petitioner when police interrogated him about the murder of Gregory Wilbon, his crime partner. The prosecution suppressed all evidence relating to the circumstances of Gregory Wilbon's death. As a result, Petitioner was unable to show that Deputy Sheriff Gilbert Gwaltney testified falsely when he told the jury that Garrett had an alibi for Wilbon's murder and was not a suspect.

Recently obtained coroner's reports for Wilbon show that when his body was discovered in the trunk of a car, it was "markedly decomposed." Gwaltney was an official witness at Wilbon's autopsy. Therefore, Gwaltney knew when he testified that it would have been impossible to determine when Wilbon was killed and impossible for James Garrett (or anyone else) to have an alibi.

In addition, Wilbon's body was found in the trunk of a car. This is a modus operandi of Garrett. The driver of a Gallo wine truck was hijacked at gunpoint and placed in the trunk of a car which was driven away. The truck and its contents were

sold. Garrett masterminded this robbery but was charged only with receiving stolen property. The driver of the truck survived because he managed to escape.

Had the jury heard the evidence about the circumstances of Wilbon's murder, the jury would have believed that Garrett falsely implicated Petitioner in order to deflect suspicion away from himself as to the Wilbon murder and the motel murders. Had the jury heard this evidence, no reasonable juror would have found him guilty beyond a reasonable doubt.

Claim Four

THE PROSECUTION KNEW SHERIFF SERGEANT GILBERT GWALTNEY GAVE FALSE AND/OR PERJURED TESTIMONY THAT ESTABLISHED AN ALIBI FOR JAMES GARRETT CONCERNING THE DEATH OF GARRETT'S CRIME PARTNER WILBON

Petitioner respectfully renews and incorporates the facts, arguments, and authorities regarding claim three.

Claim Five

THE PROSECUTION FAILED TO DISCLOSE THAT ALFRED COWARD WAS NOT A UNITED STATES CITIZEN AND THAT HE HAD A HISTORY OF PROSECUTION FOR VIOLENT CRIMES, THUS DEPRIVING PETITIONER OF THE OPPORTUNITY TO MOUNT A DEFENSE THAT ALFRED COWARD WAS THE TRUE KILLER OF ALBERT OWENS AND THAT HE FALSELY ACCUSED PETITIONER IN ORDER TO DEFLECT SUSPICION AWAY FROM HIMSELF

The prosecution failed to disclose that when Alfred Coward testified under a grant of immunity against Petitioner about the murder of Albert Owens at the 7-11, he was not a United States Citizen. He was a Canadian citizen and had three prior prosecutions for robbery and loaded guns, also undisclosed. One of these robberies took place right in front of the motel where the Yang family was murdered. Fear of deportation would certainly have been another factor motivating him to falsely testify against Petitioner. Today, Coward is a prisoner at the Joyceville Institution in Ontario, Canada, for having killed a man during a robbery.

Had the jury heard this impeachment evidence about Coward the jury would have believed that Coward was the true killer of Albert Owens at the 7-11 in Whittier. Had the jury heard the evidence, no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.

Claim Six

THE PROSECUTION'S FAILURE TO DISCLOSE THAT PETITIONER WAS FORCIBLY, INVOLUNTARILY, SURREPTITIOUSLY, AND CONTINUOUSLY DRUGGED WITH POWERFUL TRANQUILIZERS AND/OR OTHER PSYCHOTROPIC MEDICATION BY THE LOS ANGELES COUNTY JAIL AS A FORM OF MANAGEMENT CONTROL, THUS PERMITTING JAILHOUSE INFORMANT GEORGE OGELSBY TO MANIPULATE AND TRICK HIM INTO WRITING NOTES THAT PURPORTED TO PLAN AN ESCAPE[15]

Last week an inmate named Steven Derrick Irvin read about Petitioner's post judgment discovery motion and contacted the undersigned. He declared that he once saw Petitioner being injected by a black male nurse named Hodges after Williams broke his handcuffs. The injection sedated Petitioner. Thereafter, Irvin often saw Petitioner in a wheelchair because he could not walk. (SE 4)

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[15] In Williams v. Woodford, 306 F.3d 665, 706-708 (9th Cir. 2002), this Court rejected an issue concerning incompetence to stand trial due to the effects of PCP usage. In the amended federal habeas corpus petition, Mr. Williams alleged inter alia, that "inappropriate medication" was "administered by the state without petitioner's permission and without his knowledge." The claim was never developed and never ruled on. Respondent's expert conceded that inmates at the county jail were given "high doses" of tranquilizers which were not "clinically mandatory" but Respondent did not disclose any information about such practices and relied on the county's purported destruction of his medical records to thwart his due process claims. At trial, on direct appeal, and on state and federal habeas corpus, the prosecution suppressed and continues to suppress the truth about the involuntary and forced drugging of Mr. Williams with powerful tranquilizers at the county jail as a form of management control with the consequence that he was not competent to stand trial and was manipulated by a jailhouse informant. It is time to set the record straight. (Banks v. Dretke, *supra*, 540 U.S. at 675)

Petitioner has long complained that he was forcibly medicated with powerful tranquilizers while he was a pretrial detainee in 1979-1981. The judge, a juror, and his mother all stated that he appeared to be out of it. The State's psychiatrist, Dr. Ronald Markman did not dispute that in those days, the county jail gave inmates "high doses of tranquilizers" which were "not clinically mandatory." In 1976, the California State Assembly held hearings and found that inmates were being forcibly drugged to control them. However, to date, the county has never produced any of Petitioner jail medical/psychiatric/medication records from 1979 to 1981, despite the fact that records for other death row inmates who were incarcerated at the Los Angeles County Jail during that same time period have been preserved.

When inmates are drugged they are vulnerable prey for other inmates like jailhouse informants. A common modus operandi of jailhouse informants is to trick other inmates into writing notes. Recently, the Ninth Circuit freed Harold Hall, an inmate convicted of murder, after a jailhouse informant produced incriminating notes written by Hall. The informant later revealed that he had initially written questions to Hall and that after Hall responded the informant erased the questions so that the answers appeared incriminating.

In addition, a new witness surfaced at the last minute. Gordon Bradbury Von Ellerman contacted the NAACP on December 8, 2005, after reading about Mr.

Williams' plight and said that he had shared a cell with Ogelsby in 1979. With the help of Sheriff's officials, Ogelsby was practicing "replicating Mr. Williams' handwriting" so that he "could create incriminating documents that would appear to be written by Mr. Williams." (SE 11) Further investigation and an evidentiary hearing may show that the notes were forged by Ogelsby.

Had the jury heard that Petitioner was forcibly drugged with powerful tranquilizers it would not have believed jailhouse informant Ogelsby and would not have found the notes to be incriminating. Had this evidence not been suppressed no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.

Claim Seven

PETITIONER WAS FORCIBLY, INVOLUNTARILY, SURREPTITIOUSLY, AND CONTINUOUSLY DRUGGED WITH POWERFUL TRANQUILIZERS AND/OR OTHER PSYCHOTROPIC MEDICATION BY THE LOS ANGELES COUNTY JAIL AS A FORM OF MANAGEMENT CONTROL, THUS RENDERING HIM INCOMPETENT TO STAND TRIAL

Same facts as in Claim Six. In addition, because Petitioner was sedated during his trial against his will, he was not alert to what was going on. He did know that Samuel Coleman had been beaten by police after the two were arrested and before Coleman accused Petitioner of having confessed. If Petitioner had been alert at his trial he would have told his trial attorney about Coleman's beating and would have asked him to cross-examine Coleman about this beating. Had the jury heard that

Coleman's testimony was procured by a beating it would not have believed his testimony. Had evidence about Petitioner' involuntary drugging been disclosed no reasonable juror would have found him guilty beyond a reasonable doubt.

Claim Eight

THE STATE'S INTENTIONAL DESTRUCTION OF EXCULPATORY EVIDENCE IN THE FORM OF HIS JAIL MEDICAL, PSYCHIATRIC, AND/OR MEDICATION RECORDS SO THAT HIS COUNSEL DID NOT KNOW AND HIS JURY DID NOT LEARN THAT HE WAS FORCIBLY, INVOLUNTARILY, SURREPTITIOUSLY, AND CONTINUOUSLY DRUGGED WITH POWERFULTRANQUILIZERS AND/OR OTHER PSYCHOTROPIC MEDICATION BY THE LOS ANGELES COUNTY JAIL AS A FORM OF MANAGEMENT CONTROL, THUS RENDERING HIM VULNERABLE TO MANIPULATION AND TRICKERY BY A JAILHOUSE INFORMANT AND ALSO UNABLE TO COMPREHEND THE PROCEEDINGS AND/OR TO ASSIST COUNSEL IN HIS DEFENSE

Same facts as in Claims Seven and Eight. In addition, given that the medical records of other death row inmates who were at the Los Angeles County Jail at the same time as Petitioner were not destroyed, the alleged loss or destruction of Petitioner' records is the intentional destruction of exculpatory evidence. Had the evidence of involuntary drugging been preserved and disclosed no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.

Claim Nine

THE PROSECUTOR FAILED TO DISCLOSE THAT HE PROMISED ALFRED COWARD, JAMES GARRETT, AND SAMUEL COLEMAN – TACITLY OR EXPLICITLY -- THAT IF THEY GOT INTO TROUBLE WITH THE LAW

AFTER PETITIONER'S TRIAL HE WOULD INFORM THE APPROPRIATE AUTHORITIES THAT THEY TESTIFIED AGAINST PETITIONER WITH THE CONSEQUENCE THAT THEY COULD CONTINUE TO COMMIT VIOLENT AND OTHER CRIMES, KNOWING THEY WOULD SUFFER NO MEANINGFUL CONSEQUENCES FOR THEIR CRIMES

DA Martin recently told the Contra Costa Times that he told James Garrett's lawyer that if asked, he would tell Garret's sentencing judge that he had testified truthfully against Petitioner. Martin acknowledged that if a judge was told this by a prosecutor, the informant would probably get some consideration. Martin failed to disclose to Petitioner' trial attorney this secret side deal with Garrett's attorney. Garrett ultimately got probation for his pending cases though Martin denied making any deals.

After testifying against Petitioner, Alfred Coward and James Garrett continued to commit violent crimes but were treated very leniently by the District Attorney's office. In the case of Garrett, he shot his bookie in the chest and later shot a bank teller in the hand. Samuel Coleman, although not violent, also continued to violate the law but was continuously placed on probation.

This extraordinarily lenient treatment cannot be happenstance. It is rather the result of secret deals made by prosecutor Martin with Coward, Garrett and Coleman. Even if not explicitly offered as a deal, it was a deal by winking and nodding. Had the jury known that these secret deals were being made by Martin it would not have

believed anything these witnesses said. Had the deals been disclosed no reasonable juror would have convicted Petitioner beyond a reasonable doubt.

THE NEW EVIDENCE AND THE TRIAL EVIDENCE

INTRODUCTION

Petitioner has always maintained his innocence. Due to suppression of exculpatory evidence by the prosecution, Petitioner was unable to properly challenge the credibility and motive of the witnesses against him, or even to properly investigate the roles those witnesses may have played in the crimes.[16] The suppression of this exculpatory evidence prevented Petitioner from showing that the prosecution's case rested on a substandard police investigation. (Kyles v. Whitley (1995) 514 U.S. 419, 442, 446 [death judgment reversed due to "shoddy" and "slovenly" police practices that raised the "possibility of fraud."])

In particular, the suppression of exculpatory evidence prevented Petitioner from being able to mount a defense that the primary prosecution witnesses, James Garrett and Alfred Coward, were the true killers and that they falsely accused Petitioner in order to deflect suspicion away from themselves. As will be detailed below, Petitioner'

[16] As will be seen below, after testifying against Petitioner, both James Garrett and Alfred Coward continued to commit violent crimes but were treated in an extraordinarily lenient fashion by the District Attorney's Office.

case is remarkably like Kyles v. Whitley. There, the United States Supreme Court found held if the exculpatory evidence not been suppressed, the jury:

> would have been entitled to find ¶ (a) that **the investigation was limited by the police's uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent .... and whose own behavior was enough to raise suspicions of guilt**; ¶ (b) that the **lead police detective who testified was either less than candid or less than fully informed**; and (c) that **the informant's behavior raised suspicions that he had planted ...** [the] murder weapon. (Kyles v. Whitley, *supra*, 514 U.S. at p. 453, emphasis added.)

A. The California Supreme Court Twice Found that the Prosecutor Lacked Integrity

The prosecutor, DDA Robert Martin[17] was twice found by a unanimous California Supreme Court to have engaged in prohibited racial discrimination during jury selection in a capital trial. In reversing, both courts observed that Martin lacked integrity. (*See e.g.* People v. Fuentes (1991) 54 Cal.3d 707, 720 ["The trial court understandably found such reasons 'very **spurious**.'"emphasis added] and People v. Turner (1986) 42 Cal.3d 711 ["the record contains 'ample reason to suspect' that the proffered explanation" by Marin was "**not bona fide**."] Id. at 725, emphasis added, and ["we have little confidence in the good faith of his proffered explanation." Id. at 727].)

[17] DDA Martin was the prosecutor on Petitioner' case from its inception.

In closing argument in Petitioner' trial, DDA Martin compared him to a Bengal tiger in a zoo. Martin used these same racial epithets against two other black death row inmates, Henry Duncan and Melvin Turner. (*See* People v. Duncan (1991) 53 Cal.3d 955, 976, and Melvin Turner v. Arthur Calderon, CV-96-2844-AHS [Second Amended Petition for Writ of Habeas Corpus, pp. 253-254], respectively.)

B. The Trial Evidence

- The Ninth Circuit Found that the Witnesses Against Petitioner Had Less than Clean Backgrounds and Incentives to Lie

The Ninth Circuit Court of Appeals agreed that the evidence of guilt was based on "circumstantial evidence and the testimony of witnesses with less-than-clean backgrounds and incentives to lie in order to obtain leniency from the state in either charging or sentencing." (Williams v. Woodford (2004) 384 F.3d 567, 624.)

Of course, it is by now common knowledge that:

> [t]he use of **informants** to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril .... by definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from **falsely accusing the innocent, from manufacturing evidence, and from lying under oath in the courtroom**. (United States v. Bernal-Obeso (9thCir. 1993) 989 F.2d 331, 333, emphasis added.)

> The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. (On Lee v. United States (1952) 343 U.S. 747, 757.)

James Garrett

On March 14, 1979, James Garrett, a career criminal and police informant with pending felony charges[18] was interviewed by Sheriff's detectives about the murder of Gregory Wilbon, his crime partner in an insurance fraud ring. (Reporter's Transcript "RT" 1655.) In 1978, Garrett and Wilbon staged over one hundred automobile accidents on the freeway using cars obtained from auctions. (RT 1658.) Wilbon in the lead car would signal Garrett to slam on the brakes. Garrett hoped that a little old lady with lots of insurance would crash into him. (RT 1769-1770.)

Using as many as forty phony temporary driver's licenses, Garrett and Wilbon would make insurance claims and sell them to attorneys. (RT 1657-1659.) They earned about $5,000 from this scam. (RT 1660.) After Wilbon's death, Garrett took over Wilbon's business. (RT 1663.)

Garrett also planned the armed robberies of two Big Five stores (in Torrance and Inglewood) in which over one hundred weapons and an unknown quantity of ammunition was taken. After he was arrested by undercover FBI agent Larry Wansley for these robberies he began cooperating with authorities about the insurance fraud

[18] Garrett's trial testimony is found at Exhibits 912-1057, and SE 156-205.

scam. He was allowed to plead guilty receiving stolen property. (RT 1648, 1658, 1748-1758.)

Garrett was paid to act as an informant to snare one of the insurance scam's dishonest attorneys, Stephen Burke. (RT 1661-1667.) Garrett in turn double-crossed the police by extorting money from Burke. For a hefty sum, Garrett offered to testify falsely on Burke's behalf. (RT 1668.)

When the police asked Garrett about Wilbon, he told them he did not know who killed him, but said a man who sometimes stayed at his house, Petitioner, confessed to shootings at a motel at 10411 S. Vermont and a 7-11 in Whittier. (RT 1664, 1689-1690.)

Garrett described the motel murders in detail and also said that Petitioner committed the 7-11 murder with a man named Alfred "Blackie" Coward. In the presence of police, Garrett pulled a 12 gauge shotgun from underneath his own bed and handed it to them. (RT 1690.)

The shotgun had been legally purchased by and registered to Petitioner. (RT 1478-1406.) The prosecution expert opined that this shotgun fired the expended shell found at the motel crime scene. (RT 1512-1548.) Garrett denied committing the motel murders himself and said that his wife and children could verify he was home asleep that Sunday morning, March 11, 1979. (RT 1788.)

Mr. Ingber: You're sure you weren't over at the Brookhaven Motel with a shotgun?

Garrett: No sir. I didn't know what the Brookhaven Motel was until after I heard it from Stan." (RT 1789.)[19]

Ester Garrett

Garrett's wife Ester,[20] herself facing multiple felony charges, also claimed that she overheard Petitioner confess. For their cooperation, the Garretts were given money to pay living expenses by DDA Martin. When this money ran out, DDA Martin instructed her to apply for welfare. As she had done in the past, Ester committed perjury in order to receive welfare. She admitted that she perjured herself because it did not bother her to lie under oath. (RT 1958, 1988-2001.) Ester also testified that her husband frequently lost the family's money gambling. (RT 2011, 2028-2030.)

[19] Garrett's testimony that he had never heard of the Brookhaven Motel was a lie, however, which DDA Martin allowed to go uncorrected. Garrett told Sheriff's Deputies Hetzel and Solar that he had heard about the murders from his sister-in-law, Martha Hamilton, who worked right next to the motel. See *infra*, DM Exhs. 25, p.6 [294] & 26, p.3 [307] respectively.

[20] To avoid confusion, James Garrett will be referred to as "Garrett" and Ester Garrett as "Ester." Ester's trial testimony is DM Exh. 87 [1058-1167].

Alfred Coward

Alfred Coward[21] was given immunity for his self-confessed role in the robbery murder of Albert Owens. Coward testified that he, Petitioner, Tony Sims, and a man known only as "Darryl," were riding in two separate cars on their way to Pomona when they stopped at the 7-11 in Whittier. Once inside, Petitioner shot and killed Albert Owens. (RT 2146-2164.)

Samuel Coleman

Samuel Coleman, who was arrested driving a car with Petitioner as a passenger, also testified under a grant of immunity. (RT 1568.) Coleman said that Petitioner confessed to killing some people as they drove to Griffith Park to walk their dogs. (RT 1560-1563.) Coleman said the two were not close friends and did not discuss personal things, but did share a love of dogs and lifting weights. (RT 1571.) Petitioner often asked Coleman where he could find a job. (RT 1574.) [22]

George Oglesby

George Oglesby, a veteran jailhouse informant who had been arrested for capital murder and who ultimately pled to second degree murder also testified that Petitioner

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[21] Coward's trial testimony is DM Exh. 88 [1168-1136].

[22] Samuel Coleman's trial testimony is DM Exh. 90 [1346-1446].

confessed. Oglesby produced some notes written by Petitioner purporting to plan an escape. (RT 2399-2402.)

The Defense

Beverly McGowan, Petitioner' former girlfriend, testified that he was with her from February 27 to 28, 1979. (RT 2767-2768.) Fred Holiwell, Petitioner stepfather, testified that he saw him the Showcase bar in the early morning hours of March 11, 1979. (RT 2611-2623.)

C. Post-Conviction Evidence Reveals a Sloppy, Shoddy, and Slovenly Police Investigation that Raises the Possibility of Fraud

As in Kyles v. Whitley, the prosecution was so intent on convicting Petitioner that it performed a substandard crime scene investigation and ignored and/or suppressed significant evidence regarding the roles its primary witnesses – James Garrett and Alfred Coward – played in these crimes. (Kyles v. Whitley, *supra*, 514 U.S. at 453.)

The supervisor to whom DDA Martin wrote his "special circumstances penalty evaluation," (DM Exh. 58) was the Honorable Stephen Trott, then Chief Deputy District Attorney, now a Ninth Circuit Court of Appeals Judge. In 1996, Judge Trott

wrote a law review article entitled "Words of Warning for Prosecutors Using Criminals as Witnesses," 47 Hastings L.J. 1381.

The warnings given by Judge Trott about how to maintain the integrity of the prosecution while using criminal informants were repeatedly violated by DDA Martin and his agents and subordinates at the District Attorney's Office and/or the Sheriff's Department. Trott admonished prosecutors that the "truth is your stock in trade." (47 Hastings L.J. at p. 1432.) DDA Martin never learned this lesson.

For example, DDA Martin failed to heed Judge Trott's warning to:

> Be on the lookout for any telltale suggestions that **the informer is really the one who committed the crime under investigation**[23] and that he is falsely casting the blame on someone else to save his own skin. **If he knows much of the inside information about the crime,** the defense may argue that he learned it not from the defendant, but because he is the perpetrator. To under the dimensions of such a defense, read Kyles v. Whitley (1995) 514 U.S. 419. (47 Hastings L.J. at p. 1405, emphasis added.)

As detailed below, DDA Martin and the police deliberately looked the other way when James Garret and Alfred Coward repeatedly told them details about the crimes that should have made them the primary suspects.

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[23] Judge Trott's article recounts the stories of numerous people who were wrongfully convicted on the basis of criminal informant testimony. Many of these informants were the actual perpetrators themselves. (Trott, 47 Hastings L.J. at pp. 1383-1392.)

1. A DEFENSE EXPERT RECENTLY REVIEWED THE FIREARM EVIDENCE AND DETERMINED IT TO BE UNSCIENTIFIC AND UNRELIABLE BASED ON STANDARD PRACTICE IN 1979[24]

According to police reports, although the decedents sustained numerous gunshot wounds only one expended shotgun shell was found at the scene of the crime. (RT 1506.)[25] This means that the other shotgun shells had to have been picked up by the shooter(s).[26]

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[24] Because Warner's testimony is unreliable, Petitioner sought to test fire the shotgun at a firing range and examine the expended shell recovered from the motel crime scene. He also sought to re-examine the actual test firings made by Deputy Sheriff Warner. (Lamagna Declaration, ¶ 15 [7], DM Exh. 1.) Mr. Lamgna had portable equipment, including a microscope, camera, and computer, which could easily be used to reexamine Warner's test firings and compare with the recovered shotgun shell. This examination could have been done right in the exhibit room of the courthouse. Of course, to test fire the shotgun, it would have been necessary to remove the shotgun would need to be removed to a firing range. (Lamagna Declaration, ¶ 17 [7], DM Exh.1.) This Court denied the motion to retest the firearms evidence by a vote of 4 to 2.

[25] *See* March 11, 1979, Sheriff's Department Supplemental Report of Harald R. Treichler, DM Exh. 2 [11] and Testimony of Deputy Sheriff Richard Sanford (RT 1497-1512), DM Exh. 3 [12-27].

[26] Lamagna Declaration, ¶ 9, DM Exh. 1

The recovered, expended shotgun shell was made by Browning.[27] According to police reports, there were only two stores where this Browning shotgun ammunition could have been purchased in the previous year, one of which was Big Five. Big Five advised police that only one of their stores had stocks of Browning 12 gauge shotgun ammunition at the end of 1978, and that was in Inglewood.[28] In 1978, the Inglewood Big Five was robbed by James Garrett of more than one hundred firearms and an unknown quantity of ammunition.[29]

The Sheriff's Department firearm examiner, Deputy Sheriff James Warner, examined the expended shotgun shell and compared it to test firings of Williams' shotgun. On March 15, 1979, Warner stated that he could not determine if the expended shotgun shell came from Williams' gun, because there were "not enough"

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[27] *See* March 18, 1979, Sheriff's Department Supplemental Report (list of evidence held, item nos. 1-19) (File Nos. 079-04349-0372-015 [new] and 079-04349-0372-010 [old]) (The expended shell is item # 5.) and April 5, 1979, Supplemental Report (evidence held item no. 20) DM Exh. 4, pp. 1-2 [28-29] and 5, p. 1 [41].

[28] *See* March 29, 1979, Sheriff's Department Supplemental Report re "Active/Additional Information" (File No. 079/01607/1575/015), DM Exh. 6, p. 1 [48].

[29] *See* DM Exh. 30, pp. 1-2 [339-340]; 34, pp. 8-9 [373-373]; and 43, p. 5 [455].

characteristics "for a positive comparison."[30] DDA Robert Martin, told Warner to run the tests again. (RT 1543-1545.) Thereafter, on April 18, 1979, Warner changed his opinion from inconclusive to positive.[31] This is a stark example of "confirmation bias," a common problem in police work when the firearm examiner renders an opinion to please the prosecutor.[32] The fact that Warner changed his opinion, without any real scientific basis for such an opinion change, seriously undermines the reliability of his testimony.[33]

Warner testified[34] that he fired Williams' shotgun (a twelve-gauge High Standard slide-action shotgun, serial number 3194397) eighteen (18) times. (Peo. exh. 8; RT 1515-1516.) Warner compared those 18 shells with the expended shell found at the motel (Peo. exh. 9-E) under a comparison microscope. (RT 1516-1517.) Of the 18 test firings, Warner found only two (2) shells that had "sufficient marks" for a

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[30] *See* April 7, 1979, Sheriff's Department Firearms Report, Deputy James Warner, p. 4 [52], DM Exh. 7.

[31] *See* April 18, 1979, Sheriff's Department Supplemental Report, Firearms Identification, DM Exh. 8 [53].

[32] *See e.g.* Lisa J. Steele, "'All We Want You to Do is Confirm what We Already Know,'A Daubert Challenge to Firearms Identification," 38 Criminal Law Bulletin 466 (2002), pp. 10-11 [63-54] DM Exh. 9.

[33] Lamagna Declaration ¶ 11 [5], DM Exh. 1.

[34] A copy of Warner's testimony (RT 1512-1548) [77-113] DM Exh. 10.

"comparison." (RT 1520.) "The other shells were not getting a significant hit to get good marks from the breach face." (RT 1521.) Warner said that unspecified "marks" caused by the "breach face and firing pin" were "similar" to marks on the expended shell. (Peo. exh. 9-E.)

Warner apparently did not make any effort to examine and compare ejector and extractor marks on the recovered spent shotgun shell with those of his test firings. These markings are important class characteristics (and potentially sub-class characteristics) that should be examined and identified, if at all possible.[35] Warner then concluded that 9-E was fired by People's Exhibit 8. (RT 1522.) Warner also testified that the expended shell could not have been fired from any other shotgun because he could "find sufficient patterns within the breach face and the firing pin." (RT 1522-1522.)

Contrary to standard practice, Warner did not identify the markings on the spent shotgun shells by class, sub-class, and individual characteristics. His report lacks specificity regarding the type, location, and dimensions of any toolmark impressions that he utilized in his comparison and subsequent identification. Thus, there is no scientific basis for his claim that there was a "match."[36]

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[35] Lamagna Declaration, ¶ 12 [5-6], DM Exh. 1.

[36] Lamagna Declaration, ¶ 13 [6], DM Exh. 1.

Nor did Warner provide any photomicrographs of the spent shotgun shells he fired, which would have backed up his opinion. Traditionally, firearm examiners use an optical comparison microscope to compare striae and other toolmarks on the evidence bullet or cartridge case with those from a test firing. The comparison microscope allows the two images to be merged so that a comparison may be readily observed and photographed. It is standard practice for the examiner to record the observed comparison with a photomicrograph. In fact, photographs of matching toolmarks showing the imposed image of the evidence cartridge case over the test firing were presented as far back as 1921, at the celebrated trial of Sacco and Vanzetti. Without the photomicrographs, the evidence is solely one man's subjective untested opinion.[37]

There are no reports, and his testimony does not reflect, that a second firearms examiner reviewed Warner's findings and came to the same conclusions. Standard practice requires the results be validated by a second opinion, as does the Scientific Method.[38]

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[37] Lamagna Declaration, ¶ 14 [6-7], DM Exh. 1.

[38] Lamagna Declaration, ¶ 15 [7], DM Exh. 1.

2. A DEFENSE EXPERT RECENTLY EXAMINED THE AUTOPSY REPORTS AND CORONER'S TESTIMONY AND DETERMINED THAT MORE THAN ONE WEAPON WAS LIKELY USED AT THE MOTEL

The overall police forensic examination was substandard and less than thorough.[39] It does not appear that a final, formal crime scene re-construction was performed and properly documented. This crime scene analysis and reconstruction would have shown the victims and shooter(s) locations and movements during the development and performance of the criminal activity at the location in question.[40]

After reviewing the autopsy reports[41] and the testimony of the coroner, it appears that there may have been more than one weapon used. First and foremost, all the shots sustained by all of the victims appear to be either near contact or intermediate distance gunshot wounds. The frontal abdominal wound sustained by Tsai Shen Yang consisted of three buckshot pellets. The trial testimony of the deputy medical examiner, Eugene Carpenter,[42] indicates that this frontal abdominal wound was due to

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[39] Petitioner also sought to examine all the physical evidence that was gathered by the police.

[40] Lamagna Declaration, ¶ 6 [4], DM Exh. 1.

[41] See Autopsy Reports for Tsai Shen Yang, Yen Yi Yang, and Ye Chew Lin, DM Exhs. 11 [114-126], 12 [127-137], and 13 [138-147, respectively.

[42] See Testimony of Coroner Eugene Carpenter (RT 1447-1476) DM Exh. 14 [148-176].

a shot fired from three to four feet away, as listed in his hand written notes.[43] This is indicative of the frontal abdominal shot being made with a four-ten (410)-gauge shotgun, instead of a twelve (12)-gauge shotgun. A 2.5 inch 410-gauge shotgun will fire a buckshot load that consists of three (3) pellets stacked one on top of each other in the loaded shotgun shell.

On the other hand, a twelve (12) gauge 2 3/4" shotgun shell is typically loaded with nine (9), or more buckshot pellets. It is also important to note that some derringers and other handguns chambered for the 45 Long Colt will also chamber and fire some 2.5inch 410-gauge shotgun ammunition. If the decedent, Tsai Shen Yang had been shot within a distance of 3-4 feet, most, if not all nine or more buckshot pellets would have been deposited into her abdominal cavity. Yet only three buckshot pellets were found there as a result of this frontal wound. This is a very critical issue, because the pattern spread of 12-gauge buckshot at a distance of 3-4 feet from the shotgun muzzle is quite small.[44]

This leads to another issue related to the testing performed by Deputy Sheriff Warner. Warner only pattern tested the twelve-gauge, number six (6) shot ammunition (birdshot). He, for some very odd reason, did not pattern test twelve gauge buckshot

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[43] Carpenter's handwritten notes are DM Exh. 15 [177-182].

[44] Lamagna Declaration, ¶ 18 [7-8], DM Exh. 1.

loads, to determine pellet spread in relation to distance traveled from the muzzle of the shotgun barrel. This pattern testing of 12 gauge buckshot ammunition would have clearly demonstrated that the frontal wound sustained by Tsai Shen Yang was in all likelihood, **not fired from Stanley Williams' 12 gauge shotgun, or any other twelve gauge shotgun for that matter.**[45]

Finally, some effort should have been made to perform a materials analysis and identification of the plastic shotgun wadding, shotgun wadding fragments, and lead pellets that were recovered at the crime scene, and during the autopsy of the three decedents. For example, some effort should have been made to recruit the assistance of Remington and Browning to help identify which lead pellets and which wadding came from the different ammunition that may have been used in this particular shooting incident.[46]

It is therefore imperative to examine all the crime scene photographs and the autopsy photographs.[47] Petitioner post-conviction counsel do not possess these autopsy and crime scene photographs, although there are some photographs in evidence at the courthouse.

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[45] Lamagna Declaration, ¶ 19 [8], DM Exh. 1.

[46] Lamagna Declaration, ¶ 20 [8], DM Exh. 1.

[47] Lamagna Declaration, ¶ 21 [8], DM Exh. 1.

Other crime scene evidence was never processed properly. While not impossible, it is unlikely that latent, visible or plastic fingerprints of the assailant(s) did not form on some of the surfaces present at the crime scene. In particular, the security door that was allegedly ripped out of its framing by Petitioner, should have produced some fingerprint, trace, or other physical evidence that could have been traced back to the perpetrator. This same door should have also been properly examined in order to determine just how this door was compromised. In other words, was a crowbar used to help remove the door from its framing, etc.?[48]

There were no footwear impressions found inside or outside the motel that could be traced back to Stanley Williams.[49]

Furthermore, the clothing of the decedents was apparently never tested for gunshot residue (GSR), gunpowder stippling, and gunpowder residue. No effort was made to incorporate the anthropometrics of the individual victims and suspects into an organized shooting reconstruction. This information, along with bloodstain patterns, would have been useful in helping to establish locations and distances of the victims and assailant(s).[50] It is thus important to examine microscopically or otherwise, all

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[48] Lamagna Declaration, ¶ 11 [8], DM Exh. 1.

[49] Lamagna Declaration, ¶ 24 [9], DM Exh. 1.

[50] Lamagna Declaration, ¶ 25 [10], DM Exh. 1.

extant physical evidence in this case, whether it is in the custody of the superior court or the Sheriff's Department. A greater crime scene reconstruction effort should be made utilizing the existing crime scene and autopsy photographs, the physical evidence, as well as autopsy and crime scene reports.[51]

D. James Garrett

1. THE PROSECUTION'S FAILURE TO DISCLOSE ANY INFORMATION ABOUT THE CIRCUMSTANCES OF GREGORY WILBON'S DEATH MADE IT IMPOSSIBLE FOR Petitioner TO SHOW THAT DEPUTY GWALTNEY TESTIFIED FALSELY THAT GARRETT HAD AN ALIBI FOR WILBON'S MURDER

The only police information disclosed about the murder of Gregory Wilbon, Garrett's crime partner, was one sentence in a report.

> On 3-14-79, Investigators Gwaltney and Gallatin were conducting an interview in Lennox Sheriff's Station with a JAMES Garrett, MN/33, 10402 S. St. Andrews Place, Los Angeles, telephone, 754-6477, as a witness in the murder case (file #079-02625-0300-010, victim Gregory Wilbon). At the conclusion of this interview witness Garrett asked Investigators if they knew of any other murders in the vicinity within the past few days.[52]

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[51] Lamagna Declaration, ¶ 26 [10], DM Exh. 1.

[52] *See* March 19, 1979, Sheriff Department Supplemental Report, File No. 079-04349-0372-015, p. 1 [183], DM Exh. 16.

Deputy Sheriff Gwaltney[53] testified that in March 1979, while investigating the murder of Gregory Wilbon, he learned that James Garrett was "well-acquainted" with the victim. (8 RT 1870, 1874.) Garrett said he was "terribly grieved" about Wilbon's death and told Gwaltney about Wilbon's "habits, places that he went, things that he did, people he associated with." (RT 1879:3-4, 1880.)

Garrett also told him where he was the night that Wilbon was killed, which Gwaltney "checked out." (RT 1880.) Gwaltney added that James Garrett was "not a suspect" in Wilbon's murder. (RT 1885.)

> Mr. Ingber: Did he ever indicate to you where he was on the night Mr. Wilbon was killed?
>
> Gwaltney: I believe he did give us information. I can't tell you right now what it was.
>
> Mr. Ingber: Was it ever checked out?
>
> Gwaltney: Yes. (RT 1880.)
>
> DDA Martin: Sergeant Gwaltney, was James Garrett a suspect in the Wilbon murder?
>
> Gwaltney: No. (RT 1885.)

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[53] Gwaltney's testimony (8 RT 1868-1898) [184-214] DM Exh.17.

Gwaltney's testimony, informing the jury that Garrett had an alibi for Wilbon's murder, was deliberately and intentionally false.[54] The coroner's report states that when Wilbon's body was found in the trunk of a car on February 12, 1979, it was "markedly decomposed."[55] The coroner did not take the liver temperature due to advanced decomposition.[56] Nor could the coroner determine the body's alcohol content because the blood was decomposed.[57]

Given that the body was **markedly decomposed** it would have been impossible to determine when that person was killed. Therefore, it would have been impossible to establish whether James Garrett (or anyone else) had an alibi.[58]

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[54] On August 31, 2005, the undersigned obtained a copy of the undisclosed coroner's report for Gregory Wilbon, true name Willie Wilbon. *See* Miscellaneous Receipt for Coroner Case No. 1979-01980, DM Exh. 18 [215].

[55] *See* Wilbon Autopsy Report, p.12-3, of Coroner Case Report No. 79-1980, Gregory Bernard Wilbon, DM Exh. 19 [216262. Initial identification was made by his driver's license. (Autopsy Report, p. 1 [216].)

[56] DM Exh. 19, p. 6 [223].

[57] DM Exh. 19, p. 42 [246].

[58] On February 9, 1979, a Cadillac (1978), license number 875VPI was found parked across a driveway (address not provided) at 7 a.m. The car was towed to a vehicle storage yard at 150 Ivy St. Inglewood. On February 12, 1979, the attendants noted a bad odor coming from the trunk and called the police, who discovered the decomposed body. Wilbon had been shot in the head and abdomen. A plastic bag had been placed around his head. (Wilbon Autopsy Report Continuation Sheet, p. 13 [218], DM Exh. 19.)

Gwaltney's testimony is an intentional lie and not a mistake because Gwaltney was an official witness at Wilbon's autopsy on February 14, 1979. Gwaltney therefore knew when he testified that it would have been impossible to determine when Wilbon was killed and thus impossible for James Garrett to have an alibi.[59]

2. THE PROSECUTION'S FAILURE TO DISCLOSE THAT WILBON HAD BEEN PLACED IN THE TRUNK OF A CAR ALSO MADE IT IMPOSSIBLE FOR Petitioner TO SHOW THIS WAS A MODUS OPERANDI OF JAMES GARRETT

Not only did Gwaltney provide a false alibi for Garrett as to Wilbon's murder, but the police appear to have overlooked another factor that should have made Garrett a prime suspect in Wilbon's murder (and the murder of the Yang family). (S*ee* Kyles v. Whitley, *supra*, 514 U.S. at p.442 [the police investigation was substandard because it "failed to direct any investigation against Beanie" the informant] and "never treated Beanie as a suspect." Id. at p. 447.)

The placing of Wilbon's body in the trunk of a car was a *modus operandi* of Garrett. At the time of Petitioner' arrest, James and Ester Garrett were already being prosecuted for receiving stolen property for having planned the hijacking **at gunpoint**

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[59] Wilbon Autopsy Report, DM Exh. 19, pp. 12-8 and 42 [231, 247]. ["Detective Gallatin and **Gwaltney**, representing the Los Angeles County Sheriff's Department, **witnessed the photography and autopsy of the body**."] (emphasis added).

of Stanley Gantt, the driver of a Gallo Wine truck, on April 28, 1977, at 11401 South Vermont Avenue in Los Angeles. Gantt was not shot, but he, like Wilbon, was also placed into the trunk of a car. He survived because he managed to escape.[60]

It is also important to note, that the address where Gantt was hijacked was less than a mile down South Vermont Avenue from the Yang family motel.[61]

It would not be surprising, given Gwaltney's false testimony establishing a phony alibi for Garrett, that Garrett was indeed a suspect in Wilbon's murder.[62]

Moreover, Garrett told the District Attorney's Office, that after Wilbon was

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[60] *See* testimony of Stanley Gantt, the truck driver who was hijacked, at preliminary hearing of James and Ester Garrett, Case No. A-342090, on May 30, 1978, cover page and pp. 27-34, DM Exh. 20.

[61] *See* google map showing both locations, DM Exh. 21.

[62] Under California law, a person who takes an oath but then "wilfully states as true any material matter which he or she knows to be false is guilty of perjury. (Penal Code § 118.) "It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him." (§ 123.) Gwaltney's lie under oath was indeed material. It cannot be overemphasized that it was only after Gwaltney interrogated James Garrett about Wilbon's murder that Garrett implicated Petitioner in these crimes. It is also important to emphasize that perjury and/or the subornation of perjury that "procures the conviction and execution of any innocent person" is itself a capital crime, " punishable by death or life without the possibility of parole." (§ 128.)

killed he had "taken over Wilbon's cases, "[63] thus providing another motive to kill Wilbon.

Petitioner sought disclosure of the Sheriff's Department investigative reports in order to determine whether the police simply stopped investigating Wilbon's murder after James Garrett implicated Petitioner. Wilbon's sister, Theresa Daniels, recently stated that the only contact she had with the police was when they asked her to identify his body. She helped to raise Wilbon's two children and never heard from police again.[64]

3. THE POLICE FAILED TO RECOGNIZE THAT ESTER'S SISTER, MARTHA HAMILTON, WAS LIKELY CASING THE MOTEL FOR GARRETT TO ROB, ANOTHER MODUS OPERANDI

Petitioner unsuccessfully sought disclosure of any and all investigative reports and/or interviews of Martha Hamilton, who was the sister-in-law of James Garrett. The only information that the undersigned was been able to find to identify Hamilton is an

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[63] *See* August 8, 1979, memorandum re James Paul Garrett, File No. 79-4-0696, from W.T. Olson, Insurance Fraud Section to Donald F. Bowler, Chief, Bureau of Investigation, p.4 [274] DM Exh. 22.

[64] *See* Declaration of Theresa Daniels, DM Exh. 23 [283].

address [625 “87 or “89" Place, LA, phone number, 778-3004], given by Ester Garrett in 1978, on a bail application form.[65]

In March 1979, when James and Ester Garrett were interviewed by sheriff’s deputies they both said they first heard of the motel murders because Ester’s sister, Martha “Murt” Hamilton, worked right next door to the motel and told them about the crimes. Ester Garrett said:

> because she work next door to a motel ... this new store open up, called uh, the Community Store, and it’s owned by the church, and uh, she works there as – as assistant manager. It was about two doors from the motel.[66]

> ‘Murt’ ...**work right next to the people. She said that they always go over there, you know, to get change**, I said she told me about that.[67]

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[65] *See* April 4, 1978, “Application for Release Without Bail (Felony Only)” in People v. Ester Garrett, A342090, DM Exh. 24 [285].

[66] *See* transcript of March 19, 1979, taped interview of Ester Garrett with Sgt. Gene Hetzel and Deputy James Solar, at Lennox Sheriff’s Station, p. 3 [292], DM Exh. 25.

[67] DM Exh. 25, p. 6 [294], (emphasis added).

James Garrett also told sheriff's deputies that his sister-in-law, "Martha Hamilton," who worked at 104th and Market, had "also informed my wife, you know, of the incident that had happened, you know, sometime, you know, Sunday." [68]

Garrett told Hetzel that Petitioner had described the murders in detail, "the same way that it had happened, you know, the way my wife had heard it over, you know, the TV and the newspapers."[69] When Hetzel informed Garrett that there were no details regarding how the victims were dressed and/or where they were located on the news, Garrett backpedaled, and said: "No, no, it wasn't nothing like that, it was just that some people had gotten killed at a motel on Vermont, you know –that's all that she heard ...."[70]

The apparent failure to investigate the Garrett's prior connection to the motel's cash register via Ester's sister was substandard police work. (Kyles v. Whitley, *supra*, 514 U.S. at pp. 442, 446.) Not only would the suspicions of an ordinary layman be instantly aroused that Martha Hamilton may have been casing the motel for James

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[68] *See* transcript of March 15, 1979, taped interview of James Garrett with Deputy W.A. Wilson and Sgt. Gene Hetzel, at Lennox Sheriff's Station, p.3 [307], DM Exh. 26.

[69] DM Exh. 26, p. 4, [308].

[70] DM Exh. 26, pp. 4-5 [308-309].

Garrett to rob, but the prosecution was already aware that James Garrett's *modus operandi* was to send other people to case places he planned to rob.

On March 21, 1977, Garrett told undercover FBI special agent Larry Wansley that he "could supply endless amounts of stolen merchandise" from "machine guns, grenade launchers, grenades, ammunition, and handguns."[71] Garrett told Wansley he wanted him to meet his wife.[72]

On February 16, 1978, Garrett complained about the fence that Wansley had introduced him to for other stolen property jobs. Garrett:

> had been **planning a burglary of the Big 5 Sporting Goods Store in Inglewood for well over a month .... the burglary would occur in the early morning hours** of 2/19/78. He had planned to deliver the

[71] *See* March 22, 1977, Sheriff's Department Supplemental Report, File No. 477-07443-2040-325, DM Exh. 27 [321]. Because the photocopies of these reports are difficult to read, they have been retyped.

[72] In addition to her husband James, the police were also aware that Ester Garrett's brother Robert Stroud and her son-in-law Perry Hicks were involved in crime. Only two months before the motel and 7-11 crimes, Ester boasted to her probation officer that "her brother, Robert Stroud, is a numbers boss in Patterson, New Jersey. She indicated he has avoided 'hard time' because he had many officials 'in his pocket.'" *See* p. 3 [325], February 2, 1979, probation report of Ester Garrett in Case No. A342090, DM Exh. 28. Perry Hicks was James' codefendant in the extortion of attorney Burke. *See* June 29, 1979, Information in Case No. A344683, charging Perry Hicks and James Garrett with extortion, DM Exh. 29 [336-338].

weapons that they were to get from the burglary to [a fence] in Reno.[73]

Now, because of problems with Wansley's fence he would not be taking the guns to Reno. Garrett:

> stated that he had **an employee inside the store who had already set up the job and had given him the details regarding the layout** of the store and alarm system. Garrett then requested WANSLEY to accompany him to the store in order that WANSLEY could see the layout and the guns which would be stolen by his group.[74]
>
> Garrett and WANSLEY then travelled to the Big 5 Sporting Goods Store in Inglewood. At that location, Garrett directed WANSLEY's attention to an employee .... Garrett stated that the man was his **inside man** on the burglary and would handle everything.[75]

On March 4, 1978, Garrett called Wansley to tell him that:

> **his inside man** (the employee at Big 5) wanted to put the job off for one day since it would be necessary for him to open the store on Sunday morning and wanted no part of making the discovery of theft. Garrett stated that the job would go the following evening, and he would notify WANSLEY Sunday afternoon or Monday morning.[76]

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[73] *See* February 17, 1978, Sheriff's Department Supplemental Report, File No. 477-07443-2040-325, DM Exh. 30 [339] (emphasis added).

[74] DM Exh. 30 [339] (emphasis added).

[75] DM Exh. 30 [339-340] (emphasis added).

[76] *See* March 6, 1978, Sheriff's Department Supplemental Report, File No. 478-18275-2040-325, DM Exh. 31 [343] (emphasis added).

James Garrett continued to employ the same *modus operandi*[77] in crimes he committed long after Petitioner was sentenced to death. In 1990, James Garrett masterminded an armed robbery of the El Monte Employees Credit Union. He admitted to FBI Special Agent John A. Gardner, that, he was involved in:

> **basically planning the robbery, he had a white female prior to or a couple days prior to the actual robbery or day prior go into the bank and obtain that visual description of the facility**. ¶ Once he obtained that, he formulated the plan along with two other associates of his.[78]

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[77] (*See* People v. Balcom (1994) 7 Cal.4th 414) [subsequent conduct that shows a common design or plan is admissible under Evidence Code section 1101] *see also* People v. Shoemaker (1981) 135 Cal.App.3d 442, 447-48 [quoting Wigmore: "There is no difficulty from the point of view of the relevancy of character; a man's trait or disposition a month or a year after a certain date is as evidential of his trait on that date as his nature a month or a year before that date; because **character is more or less a permanent quality and we may make inferences from it either forward or backward**."] emphasis added.)

[78] *See* Preliminary Hearing Transcript of People v. James Paul Garrett aka Melvin Lockhart, in Case No. KA005712, October 22, 1990, DM Exh. 32 (RT 14) [358] (emphasis added).

4. JAMES GARRETT'S MODUS OPERANDI PRIOR TO AND AFTER Petitioner' TRIAL ALSO INCLUDED PREYING UPON THE INNOCENT PUBLIC WITH GUNS

When James Garrett first implicated Petitioner in these crimes, he was facing trial in two felony prosecutions. His New Jersey rap sheet shows that when he came to California he had already been arrested for armed robbery and assault with a deadly weapon four times between 1970 and 1972. He did time in New Jersey state prison for armed robbery.[79]

On March 3, 1978, Garrett was arrested along with his wife Ester, at the Ramada Inn in Culver City. Although he confessed to being the "mastermind" of several armed robberies, he was only charged with receiving stolen property:[80]

(1) On March 24, 1977, a salesman at a Lincoln Mercury dealership was carjacked **at gunpoint**;

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[79] *See* New Jersey "Rap Sheet" for FBI No. 336920F and New Jersey State Bureau No. 203848-A for James Paul Garrett Jr., DM Exh. 33 [363-364].

[80] Deputy Sheriff E. Huffman, who was in charge of the major violator crew stated that "the Garretts were the principal movers behind all those robberies." *See* Ester Garrett probation, report, 2/2/79, p.11[337] DM Exh.28.

(2) on April 8, 1977, the driver of a Gallo wine truck was hijacked **at gunpoint** [the driver was placed in the trunk of a car; the truck and 245 cases of wine were sold];

(3) on February 27, 1978 and March 7, 1978, two Big Five Stores in Inglewood and Torrance were robbed of more than 120 firearms and an unknown quantity of ammunition. Garrett admitted that he had planned the robberies and hired three men who forced the employees and customers **at gunpoint** to lie down on the floor in the back room.[81]

On April 12, 1979, Garrett was charged with extortion and ultimately given probation. Garrett attempted to extort money from Stephen Burke, the attorney with whom he and Wilbon had been staging automobile accidents to get insurance claims. When Garrett when to Burke's office he was **carrying a loaded shotgun** at his side.[82] Burke felt very threatened by the shotgun.[83]

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[81] *See* September 1981, probation report of James Garrett in Case No. A342090, pp. 6-7 [370-371], DM Exh. 34 ; James Garrett probation report in Case No. A904142, DM Exh. 35; *see also* Inglewood crime report re: robbery of Big Five & City of Hawthorne Crime report re: robbery of Big Five, DM Exhs. 36 [394-399] and 37 [400-416], respectively.

[82] *See* December 4, 1979, probation report of codefendant Perry Hicks (Garrett's son-in-law), Case No. A344683, p. 5 [421], DM Exh. 38.

[83] *See* December 1979, probation report for James Garrett in Case No. A344683, p. 6 [432], DM Exh. 39. *See* also June 14, 1979, preliminary hearing

When it came time for sentencing on the receiving stolen property cases, the probation officer was against giving Garrett probation again.

> Probation officer views the defendant's involvement in the present matter as very serious and it is further noted that the defendants actions tended to have caused younger persons to become criminally involved. Due to the seriousness of the present matter, probation officer seriously questions whether or not the defendant should be continued under probation supervision and feels that perhaps his needs may best be met by a period of incarceration.[84]

Nevertheless, on September 9, 1981, Garrett was sentenced to probation by the Honorable Richard Gadbois after he had a "long conversation with Mr. Martin."(RT 5.)[85]

5. RECENTLY DDA MARTIN REVEALED THAT HE HAD A SECRET SIDE DEAL WITH GARRET'S ATTORNEY

DDA Martin maintained that he had no undisclosed deal with Garrett in regard to the charges that were pending when he testified against Petitioner. (Williams v. Woodford, 384 F.3d at 597.) However, Martin recently revealed that he had a secret

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testimony of Stephen Burke, in Case No. A344683 (RT 14-17) [439-442], DM Exh. 40.

[84] DM Exh. 34, p.13 [377].

[85] *See* "Probation" transcript for September 9, 1981, for James and Ester Garrett, in Case No. A342090, p. 6 [448] DM Exh. 41.

side deal with Garrett's attorney. Although declining to cal it a deal, Martin told the Contra Costa Times:

> The only thing I told Garrett's attorney – this is quite usual – is that if his judge called me and asked if he gave honest truthful testimony, I'd say yes," said Martin, now retired. "If ... the judge learns that the testified truthfully in a murder case, he's **probably going to get some consideration**.[86]

6. GARRETT CONTINUED TO COMMIT VIOLENT CRIMES AND GET AWAY WITH IT

While on probation, Garrett was arrested for carrying a concealed firearm [PC § 12025] and **carrying a loaded firearm in a public place** [§ 12031]. On October 13, 1982, the case was disposed of as a misdemeanor and he was sentenced again to probation. (Case No. M177556.)[87] On March 19, 1983, to collect on his unpaid gambling winnings, Garrett **shot his bookie in the chest** with a .38 revolver while the victim was parked in his car. The victim returned fire and Garrett was shot in the shoulder and elbow. The victim survived but informed the probation officer that a bullet in his shoulder could not be removed and that he continued to suffer much pain.

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[86] *See* John Simerman, "Clemency Bid to Include Claims of Error in Trial," Contra Costa Times, December 4, 2005, Exhibit 8 (HR 16). (emphasis added).

[87] *See* Criminal History in Probation Report for Garrett, Case No. KA002730, p. 4 [455] DM Exh. 42.

Though Garrett was charged with attempted murder he was allowed to plead guilty to assault with a deadly weapon. The probation officer wrote:

> In considering the nature and sophistication of the defendant's involvement in his two prior felony criminal matters, it is quite apparent that he is quite criminally oriented. Although the defendant was shown much consideration by being granted a formal probation in each of his criminal offenses, he subsequently exploited the trust placed in him by the court by failing to report on these grants of probation. As a result of his irresponsible behavior, the defendant had two outstanding warrants for his arrest at the time of his arrest in this matter. In his statement to the probation officer, the **defendant attempted to totally exonerate his violent behavior** by alleging that it was the victim who initiated the assault upon him. Further, the defendant, **candidly admitted the fact that for the past several years he has armed himself with a weapon** because of his need for protection. Because of the nature of his statement, the **defendant exhibited no remorse or concern about the plight of the victim.** Judging from the victim's remarks about his injuries, it can be assumed that he will suffer permanent injury throughout his life because of the **defendant's violent behavior**.[88]

> In considering the defendant's criminal arrest record and the above aggravating circumstances, it is apparent that the **defendant's presence within the community constitutes a serious danger to others**.[89]

On November 11, 1983, Garrett was sentenced to 5 years in state prison.[90] According to a subsequent probation report, however, he appears to have served no

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[88] *See* November 1983, probation report for James Garrett in Case No. A904142, pp. 11-12 [472-473] DM Exh. 43 (emphasis added).

[89] DM Exh. 43, pp. 12-13 [473-474] (emphasis added).

[90] *See* "State Prison" transcript in Case No. A904142, p. 3 [478], DM Exh. 44.

more than 2 years before being paroled. He was returned to prison in March 1986, after violating parole and was reparoled in April 1989.[91]

On April 8, 1989, he was arrested for being under the influence in San Bernardino, case No. 8904330578. The disposition is unknown.[92]

On November 12, 1989, Garrett was again arrested for carrying a concealed weapon and a **loaded firearm in a public place**. (Case No. 89M00502). He was sentenced to 10 days in jail.[93]

On May 15, 1990, he was arrested in West Covina for a minor traffic violation and sentenced to probation. (Case No. 90M01999.)

On December 17, 1990, Garrett was charged with three counts of armed robbery.[94] He entered the Pomona Valley Credit Union on West Holt in Pomona dressed as a UPS driver. After asking for the manager, "he **pulled a gun**" on her and demanded to be taken to the safe. After finding there was only coin in the safe, he ordered the tellers "**at gunpoint**," to open the cash drawers. During the robbery, he

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[91] *See* probation report for James Garrett in Case NO. KA005712, p. 4 [484], DM Exh. 45.

[92] DM Exh. 45, p. 4 [484].

[93] DM Exh. 45, p. 4 [484].

[94] *See* Information and Amended Information in Case No. KA002730, DM Exh. 46 [486-489].

shot teller Elizabeth Simpson in the hand. Garrett left with more than six thousand dollars.[95] Simpson needed the care of a psychologist and the credit union lost three employees.[96]

> The present offense is a **daring professional style robbery during which the defendant threatened the lives of numerous employees of the credit union and wounded one victim** ....¶ The defendant was on parole at the time of his involvement in the present offense, having been previously convicted of assault with a deadly weapon and receiving stolen property offenses, both of which were aggravated crimes ... defendant is a **professional criminal, and ... represents a significant threat to the public safety and welfare**.[97]

Also in 1990, Garrett was arrested for the armed robbery of another credit union, this one in El Monte.[98] (Case No. KA005712.)

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[95] DM Exh. 42 [453] (emphasis added).

[96] DM Exh. 42 [453].

[97] DM Exh. 42 [459] (emphasis added).

[98] *See* Transcript of Preliminary Hearing, in Case No. KA005712, pp. 4, 9-10 [493, 498-499], DM Exh. 47.

Court proceedings were suspended for some time in both these cases because Garrett lost his ability to speak after suffering several strokes.[99] On February 11, 1992, Garrett was determined to be competent to stand trial.[100]

On November 10, 1992, James Garrett pled guilty to four counts of armed robbery for both cases. Despite having shot a bank teller in the hand, terrifying other employees, and taking thousands of dollars, not to mention an already considerable prior record, Garrett was sentenced to only 2 years imprisonment on all counts to run concurrent. He was ordered released forthwith for time already served.[101]

The prosecution will no doubt insist that Garrett was never promised he would be given a license to go on committing violent crimes and get away with it because he testified against Petitioner. However, the District Attorney – and Garrett – both knew that he could continue to call in favors for the rest of his criminal career. A training

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[99] *See* January 30, 1991, letter from John M. Mead, M.D. to Honorable Robert Gustaveson, and February 4, 1991, letter from Kaushal K. Sharma, M.D., to Honorable Robert Gustaveson, re James Paul Garrett in Case Nos. KA005712 and KA002730, DM Exh. 48 [408-509] and 49 [510-512], respectively.

[100] *See* Certification of Mental Competence Section 1372 Penal Code, in People v. James Garrett, Case Nos. KA005712 and KA002730, DM Exh. 50 [513].

[101] *See* Abstract of Judgment in Case Nos. KA002730 and KA005712, DM Exh. 51 [514-515].

memorandum written by Los Angeles DDA Elliot Alhadeff cautions prosecutors that informants must be kept happy long after they have left the witness stand.

> If you alienate the informant you run the risk of his recanting the testimony you agreed to use ....So, nurse the witness. This does not mean you have to cave in .... but the witness should be confident you will be there to take care of the important requests.[102]

E. Alfred Coward

1. THE PROSECUTION FAILED TO DISCLOSE THAT ALFRED COWARD WAS NOT A UNITED STATES CITIZEN AND THAT HE HAD THREE PRIOR PROSECUTIONS FOR ARMED ROBBERY AND/OR WEAPONS VIOLATIONS

DDA Martin violated another of Judge Trott's warnings by failing to do (most likely on purpose) even a minimally competent job in checking out Alfred Coward's background and credibility:

> Witnesses often have a major personal stake in their crediblity contest with the defendant. Full disclosure of all relevant information concerning their past record and activities through cross examination and otherwise is indisputably in the interests of justice. (47 Hastings L.J. at p. 1419.)

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[102] *See* Alhadeff, "Use of Jail House Informants," ¶ 25, p.11[529] [written sometime in the 1980s and disclosed during the wake of the jailhouse informant scandal], DM Exh. 53. Garrett's lifetime pass to commit violent crimes but spend little time in prison is a tragic example of prosecutors using winking and nodding to get around Brady and Giglio. (*See e.g.* Campbell v. Reed (4th Cir. 1979) 594 F.2d 4; Willhoite v. Vasquez (9thCir. 1990) 921 F.2d 247; and Randolph v. State of California (9thCir. 2004) 380 F.3d 133, for examples of winking and nodding to avoid constitutional obligations.)

> What motivates the witness? ¶ Do not be afraid to subject the story and and the witness to intense scrutiny and cross-examination .... Mistrust everything he says. Be actively suspicious. Look for corroboration on everything you can; follow up on all indications that he may be fudging. Secure information on the witness' background: mental problems, probation reports, prior police reports. (47 Hastings L.J. at pp.1405-1406.)

2. Today Coward is in Prison In Canada for Killing a Man During a Robbery

At the time of Petitioner' trial in 1981, the prosecution failed to disclose that Alfred Coward was not a United States Citizen.[103] Because he already had a lengthy arrest record for guns and robbery (also undisclosed), his fear of being deported was another incentive to testify falsely against Petitioner.

A probation report in 1974, obtained by post-conviction counsel, states that Coward was born in St. Johns, Canada, and that he moved to Los Angeles from Canada, in 1958, when he would have been 3 years old.[104] A probation report from

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[103] Martin recently claimed he did not know Coward was a Canadian citizen. See Declaration of Robert Martin; Opposition to Discovery Motion, Exh. 5, p. 3, Supp. Exhibit 7. (HR 14.)

[104] *See* August 29, 1974, probation report of Alfred Reginald Coward in Case No. A306026, p.1 [534], DM Exh. 54.

1990, obtained by post-conviction counsel, states that his "Alien Registration Number is ALL751854."[105]

Today, Coward is a prisoner at the Joyceville Institution in Ontario, Canada, Prison No. 276539E, serving a seven year sentence for manslaughter and robbery. According to Ottowa, Ontario Superior Court of Justice records, he robbed and killed 80 year old Alfred Racicot on December 12, 1999.[106] Coward punched Racicot from behind. Mr. Racicot fell and hit his head, went into a coma, and died the next day.[107]

Although the beating and subsequent robbery was caught on tape by a security surveillance camera, Coward maintained his innocence until sentencing, as reported by the CanWest News Service:[108]

> Initially Charged with murder, but later with manslaughter, Coward claimed throughout the trial that he was in bed with the flu on the night of the killing, and that he had never seen [the victim], and that he was an innocent victim of mistaken identity facing prison because of blurred images from a faulty camera.

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[105] *See* October 19, 1990, probation report in Case No. BA026000, p.8 [551], DM Exh. 55. An alien registration number has an "A" followed by eight digits. The number may be A1175184.

[106] *See* Crown v. Alfred Coward, Court File No. 00-G19295, docket and indictment, DM Exh. 56 [556-561].

[107] *See* Declaration of Carmela Floro, DM Exh. 57 [562-563].

[108] See Randy Boswell, "Death Row Case in U.S. Reveals Ottawa Link," The Ottawa Citizen, December 8, 2005, Supp. Exhibit 9 (HR 19.)

> But after he was found guilty and was facing sentencing, Coward admitted that he was, in fact, the man who had beaten and robbed [the victim], leaving him to die.

Coward has thus shown himself not only to be a violent criminal for more than 30 years, but to be someone who was willing to lie under oath for as long as it benefitted him to do so.

Coward is the only witness apart from James Garrett linking Petitioner to the 7-11 murder and he was given immunity for his claimed role in capital murder. DDA Martin conceded that "corroboration" for Coward's testimony was "thin,"[109] but insisted that Coward was not armed.

> **Because Coward did not have a weapon,** did not receive any money from the crime, was the least culpable of the four participants, and was willing to testify for the People if granted immunity, approval was obtained pursuant to P.C. Section 1324.[110]

DDA Martin failed to inform Judge Trott and/or his other superiors (or Petitioner) that by that point in time, Coward already had a considerable criminal record involving armed robbery and loaded weapons. Had Martin been candid with

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[109] *See* June 1, 1979, memorandum from Robert Martin to Stephen Trott through Michael Genelin, re People v. Stanley Williams and Tony L. Sims, Case No. A194636, p. 2 [565], DM Exh. 58.

[110] DM Exh. 58, p. 2 [565], emphasis added.

his superiors he would have had a hard time convincing them that Coward was not armed at the 7-11 and/or that he should be granted immunity.

In 1971, at the age of 16, Coward was arrested for armed robbery. The probation officer noted that he was "gang oriented" and "totally beyond the control of his mother or anyone else." He was placed in several boys homes and returned to his mother after completing juvenile probation.[111]

On August 26, 1973, no longer a juvenile, Coward was arrested for carrying a loaded firearm in a public place. On November 29, 1973, he was placed on probation. (Case No. M-86583.)[112]

On March 17, 1974, Coward was arrested for armed robbery. DDA Martin failed to inform his superiors and Petitioner that Coward had pulled a gun on Jarvis White, a former classmate, and demanded money. Coward took $2,500 from White.[113] Even more significant, Martin failed to inform his superiors and Petitioner

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[111] DM Exh. 54, pp. 2-4 [535-537].

[112] DM Exh. 54, p. 4 [537].

[113] *See* April 15, 1974, Preliminary Hearing Transcript in Case No. A306026 (RT 5-7) [574-575], DM Exh. 59.

that this armed robbery took place at **104th and Vermont**, which is the location of the Yang family motel. [114]

Coward was allowed to plead guilty to a lesser offense of grand theft person and placed on misdemeanor probation.[115] This disposition was contrary to the probation officer's recommendation that he be sent to the Youth Authority to "impress" him "with the **seriousness of possessing and using weapons** in the community."[116]

> The probation officer is highly disturbed by the nature of the defendant's recent activities and the fact that **this is the defendant's second offense in a one-year period involving the use or possession of a weapon.** The defendant is presently in direct **violation of his active probation which requires the defendant not to own or possess any gun or firearms**.[117]

Coward subsequently violated probation for numerous arrests: (1) On April 27, 1975, for possession of drugs;[118] (2) on May 21, 1975 for disturbing the peace (Case

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[114] DM Exh. 54, p.5 [538]; DM Exh. 59 (RT 9) [577].

[115] DM Exh. 55, p.4 [547] .

[116] DM Exh. 54, p.9 [542] (emphasis added).

[117] DM Exh. 54, p.9 [542] (emphasis added).

[118] *See* June 7, 1976, probation report, Alfred Coward, Case No. A306026, p.3 [586], DM Exh. 60.

No. M 14838);[119] (3) on April 2, 1976, for grand theft auto;[120] and (4) on May 4, 1976, for burglary (Case No. M 13091).[121] These cases resulted in little jail time or dismissals.[122]

After being admonished for the probation violations, Coward eventually completed probation and the case was dismissed on February 5, 1979, less three weeks before the 7-11 robbery murder of Albert Owens.[123]

3. AFTER TESTIFYING AGAINST Petitioner COWARD CONTINUED TO COMMIT CRIMES AND SUFFER NO CONSEQUENCES

The grant of immunity to Alfred Coward after he admitted having committed capital murder not only resulted in Petitioner' wrongful conviction, but permitted Coward (like James Garrett) to continue to prey upon the innocent and unsuspecting public and get away with it.

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[119] DM Exh. 55, p.4 [547]

[120] DM Exh. 60, p. 3 [586].

[121] DM Exh. 60, p. 3 [586]

[122] DM Exhs. 55, pp. 4-5 [547-548], 60 p. 4 [587].

[123] *See* Petition and Order under PC 1203.4 or PC 1203.4a, filed February 5, 1979 [589], DM Exh. 61.

On December 17, 1984, Coward was convicted of federal conspiracy and given five years probation. Coward and others were involved in a scheme to steal student loan checks and sell them.[124]

On June 9, 1989, Coward was arrested for possession of narcotics for sale. The District Attorney declined to prosecute[125] On July 11, 1989, Coward was arrested for burglary. Once again, the District Attorney declined to file charges.[126]

On May 16, 1990, Coward was arrested for receiving stolen property. Again the District Attorney declined to file charges.[127]

In October 1990, Coward was charged with burglary and pled guilty. [128] The probation officer recommended state prison, noting that Coward,

> has a criminal history dating back several years. His various periods of incarceration on the county and federal level have had little effect in changing his life style. He recently completed a five year federal probation grant and then became involved in this present matter. ¶ It is apparent that the defendant has no respect for the rights and property of other people. His criminal behavior goes on unabated.[129]

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[124] DM Exh. 55, pp. 4-5 [547-548]

[125] DM Exh. 55, p. 5 [548].

[126] DM Exh. 55, p. 5 [548].

[127] DM Exh. 55, p. 5 [548].

[128] DM Exh. 55, p. 1 [544].

[129] DM Exh. 55, p. 10 [553].

Despite the probation officer's recommendation, on October 29, 1990, Coward was placed on probation by the agreement of the District Attorney.[130] Upon his return to Canada, Coward robbed and killed again.

F. Samuel Coleman

1. THE JURY NEVER HEARD THAT SAMUEL COLEMAN WAS SEVERELY BEATEN BY THE POLICE AND THEN OFFERED IMMUNITY BY THE DISTRICT ATTORNEY[131]

According to DDA Martin, Samuel Coleman was given immunity at the insistence of an attorney he had retained. At the preliminary hearing on April 18, 1979, just prior to his testimony, DDA Martin informed the court that Coleman had waived his right to a hearing under Penal Code section 1324, in the presence of his attorney Walter Gordon. The immunity order was signed by the Honorable Burch Donahue on April 17, 1979.[132] (CT 106.)[133]

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[130] *See* Guilty Plea; Probation Transcript in Case No. BA 02600 (RT 7) [596], DM Exh. 62.

[131] The issue of whether Samuel Coleman's testimony was coerced was raised and rejected in prior proceedings. *See infra* p. 84.

[132] The undersigned does not have a copy of Coleman's immunity papers.

[133] Samuel Coleman's preliminary hearing testimony is DM Exh. 89 [1337-1345].

Prior to Coleman's testimony at Petitioner' trial on February 11, 1981, DDA Martin told defense counsel that Coleman had never been charged with anything but he had been given immunity at the insistence of his attorney, Walter Gordon. (RT 1550-1551 [1347-1348].) When defense counsel said that he "could not envision that he would be granted immunity to testify in this case unless he were charged with something having to do with this case, DDA Martin replied, "We've turned over all the discovery to you counsel. ¶ Have you ever found anything that would indicate that Samuel Coleman was ever charged with anything?" (RT 1551 [1348].)

In 1994, Coleman declared that after being arrested he was so severely beaten by the police he lost consciousness. Two of his ribs were broken. While still in police custody he was visited by someone from the District Attorney's Office who offered him immunity to testify against Petitioner.[134] Coleman feared that if he did not testify the way the police wanted him to he faced a lifetime of beatings, detentions on the street, and harassment by the police.[135]

The Ninth Circuit Court of Appeals held that Coleman's testimony was not coerced because of the passage of time between the beating and the trial and because

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[134] *See* March 23, 1994, Declaration of Samuel Coleman Declaration, ¶¶ 3-4 [599-600] DM Exh. 63.

[135] Coleman Declaration, ¶ 7 [600-601], DM Exh. 63.

he was represented by counsel. (Williams v. Woodford (9thCir. 2002) 384 F.3d at p. 595.) "With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court." (Ibid, citing Cooper v. Dupnik, (9thCir. 1992) 963 F.2d 1220, 1240 (en banc).

The Ninth Circuit also said that "the record does not indicate that Coleman's attorney objected to coercive practices by the state at trial or in the negotiations regarding Coleman's immunity." (Williams v. Woodford, *supra*, 384 F.3d at p. 595.) That a lawyer would fail to complain about his client having been severely beaten by the police is an indication that Coleman either did not have an attorney at the time he was questioned by the police, did not trust the lawyer enough to confide in him, and/or the lawyer was in the pocket of the prosecution. That Coleman's lawyer did not object is most likely because it was the District Attorney's Office that arranged for his lawyer for a very limited purpose; i.e. immunity.

It is highly unlikely that a young man in Coleman's situation would have had the resources and wherewithal to retain an attorney.[136] His lawyer, Walter Gordon (State Bar No. 15769) was the father of the lawyer who had been representing Ester Garrett

[136] In his own criminal prosecutions, Coleman was always represented by court appointed counsel. See 1979, municipal court docket sheet for Case No. 3112361, DM Exh. 64 [602], and face sheet to Probation hearing transcript, Samuel Coleman, Case Nos. BA025370, A964364, and A973019, DM Exh. 65 [603].

in her pending receiving stolen property case, Walter Gordon III[137] (State Bar No. 59019). This is the case where both James and Ester were acting as police informants.

Samuel Coleman has recently declared that he cannot remember hiring an attorney to represent him and does not remember having an attorney when he testified against Petitioner.[138] Walter Gordon III recently spoke to his father, who had no recollection of ever having anything to do with Petitioner' case.[139] What is likely, is that the senior Gordon assisted with witnessed the immunity paperwork and had nothing more to do with the case.

2. AFTER Petitioner' TRIAL, COLEMAN CONTINUED TO VIOLATE WITH THE LAW AND GET AWAY WITH IT

Although Coleman does not appear to have been a dangerous and/or violent individual like James Garrett and Alfred Coward, he continued to have problems with the law. He, too, continued to be treated in an extraordinarily lenient fashion by the justice system.

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[137] *See* DM Exh. 41, p.1 [443] (sentencing hearing for A342090, 9/9/81, "Ester Garrett with her attorney Walter Gordon, III.") Walter Gordon III also represented Ester Garrett at the preliminary hearing on May 30, 1978, DM Exh. 66 [604].

[138] *See* November 29, 2005, Declaration of Samuel Coleman, attached as Supp. Exhibit 13 (HR 13.)

[139] *See* November 23, 2005, Declaration of Verna Wefald, attached as Supp. Exhibit 4 (HR 9.)

In 1980, Coleman was arrested on an unrelated drug charge. Because the police knew that he was slated to testify against Petitioner he was not beaten again and was given a diversionary sentence.[140]

In February 1988, Coleman was arrested during a traffic stop and charged with possession of rock cocaine (HS § 11350(a). (Case No. A964364.) In July 1988, he was arrested after officers saw him drop a plastic baggie resembling rock cocaine. (Case No. A973019). Coleman admitted to the probation officer that he had been using cocaine for three to four years and desired help.[141] He was placed on probation and ordered to submit to drug testing.

Coleman violated his probation, however, with dirty tests and a new arrest for being a felon in possession of a firearm. (Case No. BA025370.) Coleman had been arrested after a bystander flagged down a police officer and said someone was shooting in front of a nearby bar. Officers found Coleman inside the bar with a .38.[142] After admitting being in violation of probation on the two earlier cases, he pled guilty

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[140] Coleman Declaration ¶ 7 [600-601], DM Exh. 63.

[141] *See* September 1988, probation report for Samuel Coleman in Case Nos. A964364 and A973019, pp. 5, 8 [609, 612], DM Exh. 67.

[142] *See* October 1990, probation report for Samuel Coleman in Case Nos. BA025370, A964364 and A973019, pp. 2 [617], DM Exh. 69.

and was placed on probation with the agreement of the District Attorney. (RT 11,15-16.)[143]

In September 1991, the probation officer found he had violated his probation twice in five months for failing to report and for missing his drug counseling sessions.[144] On October 2, 1992, at the probation revocation hearing, Coleman was continued on probation. As a condition, he was given 66 days in the county jail and ordered to report to a residential treatment program.[145] It is unknown whether Coleman's drug treatment was successful.

G. Drugging

1. THE PROSECUTION FAILED TO DISCLOSE THAT FORCIBLE DRUGGING OF INMATES WITH POWERFUL TRANQUILIZERS TO CONTROL THEM TOOK PLACE AT THE LOS ANGELES COUNTY JAIL IN 1979-1981

Petitioner has long sought all medical and psychiatric records regarding the involuntary drugging that he was subjected to at the Los Angeles County Jail from

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[143] *See* October 18, 1990, Sentencing Transcript for Case Nos. BA025370, A964364 and A973019, 4-5 [619-620], DM Exh. 68.

[144] *See* August 1991, probation officer's report in Case No. BA025370, A964364, and A973019, p. 4 [647], DM Exh. 70.

[145] *See* Transcript of Probation Modification Hearing in Case Nos. BA025370, A964364, and A973019, pp. 2, 5-6 [651, 654-655], DM Exh. 71.

1979 to 1981.[146] Thus far, the county has claimed that Petitioner' records no longer exist because they were routinely destroyed after 7 years. None of Petitioner medical, psychiatric, or medication records from 1979 to 1981, have ever been produced despite numerous requests through subpoenas and/or the Public Records Act.

It is unusual for the county jail medical/psychiatric/medication records not to be sent to San Quentin Prison when an inmate has been sentenced to death in Los Angeles. Moreover, medical records for other death row inmates who were housed in the county jail at the same time as Petitioner were retained long after 7 years.[147]

2. Petitioner' MEMOIRS ABOUT BEING DRUGGED

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[146] Petitioner unsuccessfully sought the names, business addresses and telephone numbers of all county personnel (Sheriff's Department and/or Department of Mental Health), whether civilian staff or sworn officers, who worked at the county jail from 1979 and 1981, and who authorized, participated in, and/or were aware of the involuntary/forced medication of Petitioner.

[147] *See* October 20, 2005, Declaration of Renee Manes [659-660]; October 21, 2005, Declaration of Margo Rocconi [661-665]; March 13, 1996, Declaration of Jamilla Moore [666-667]; December 28, 1992 Letter from Jacqueline Porche, Medical Records, Department of Mental Health to California Appellate Project [668]; and March 26, 1998, letter from James M. Owens to Emilio Varanini, Deputy Attorney General [669], DM Exh. 72-76, respectively.

In his memoirs, Petitioner recounts being drugged by county jail personnel, the effects of which took many years to wear off.[148] When he was first locked up in the county jail, he was a gang member facing four counts of capital murder, and no doubt his "enormous size from pumping iron" was intimidating. (*Blue Rage, Black Redemption,* p.205.)[149] Petitioner soon found objects in his food, from thumb tacks, to clumps of hair, to broken glass. He responded by throwing objects and spitting on the officers. (Id. at p. 207.)

On one occasion when he was handcuffed the deputy "found it amusing to use undue force by twisting my wrist." (Ibid.) When the cell door was opened, Petitioner broke out of his handcuffs and dashed at the deputy who managed to slam the cell door shut. Petitioner braced himself for corporal punishment, and was surprised that this did not happen. His dinnertime "meal had been spiked with a tranquilizer that knocked me out cold." (Id. at p. 208.) When he regained consciousness he found himself in "five points," "harnessed to a steel bunk with leather straps.

> Each strap is positioned at one of the four corners, or points of the bed, to secure both writs and both ankles. The longer, thicker wider fifth

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[148] *See* December 1, 2005, declaration of Stanley Williams, attached as Supp. Exh 3 (HR 6.).

[149] *See* Williams, "Blue Rage, Black Redemption," Chapters 25 ["The Longest Day"]; 26 ["A Rage of Another Kind"]; and 27 ["The Missing Years"], pp. 197-211, 228-239 [670-686], DM Exh. 77.

> strap extending from the middle point of the bunk is wrapped around the upper torso. (Ibid.)

From that point on, whenever he was moved from his cell to the medical unit he was drugged. (Ibid.)

He was forcibly administered tranquilizers when in five points. Other times the tranquilizers would be disguised as part of his high blood pressure medication. (Ibid.) The nurse would check to see if he had swallowed everything and he felt obliged to take the medication. (Ibid.) "The violence done to [his] mind was far worse." (Id. at p. 209.)

> Its effect would be to suspend me in oblivion for days. Even when I awakened, there was no way to banish the experience from my mind because of the lingering after-effects; drowsiness, poor coordination, slurred speech and general mental confusion. (Id. at p.209.)

Petitioner tried to avoid these chemical onslaughts by refusing to eat the jail food and trying to subsist on candy bars. He also informed his defense attorneys that he was being drugged, to no avail. (Ibid.) "The most frightening reality of being forcibly drugged is that no one was trying to revive me from my coma-like state .... It was a living death." (Id. at p. 209.) These tranquilizers were far more powerful than street drugs such as PCP. "It was like being buried alive." (Id. at p. 210.)

> [I]n the courtroom I felt as weak as a lamb, physically defenseless, in chains and with no control over what was being done to me. My reasons for feeling mentally defenseless were twofold; my mind was unstable due

> to the 'therapeutic' druggings I was enduring .... I was reduced to marionette status, nodding my head if and when an attorney suggested it, though I comprehended absolutely nothing. (Id. at p. 211.)

3. STEVEN DERRICK IRVIN REMEMBERS Petitioner BEING DRUGGED WHILE IN THE HIGHPOWER SECTION OF THE COUNTY JAIL

Steven Derrick Irvin, an inmate at the Los Angeles County Jail, Booking No. 6409414, recently came forward with information about Petitioner being forcibly drugged while in the highpower module.[150] Irvin read in the newspaper that the undersigned had filed a discovery motion seeking information about Williams being drugged in the county jail, and contacted my office. (HR 4.)

In 1979, for a short time Irvin was in the highpower section of the county jail with Stanley Williams. On one occasion he saw Petitioner break out of his handcuffs. Deputies then restrained him and a black male nurse named Hodges injected him with some type of drug right in front of me. This injection immediately caused Williams to become sedated.

Thereafter, during the time that Irvin was in highpower, he saw deputies often moving Petitioner about in a wheelchair because he could not walk. It appeared that Williams was unable to walk because he was sedated with powerful tranquilizers. It

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[150] *See* December 6, 2005, declaration of Steven Derrick Irvin, attached as Supp. Exh 2 (HR 4.)

was common knowledge that the jail authorities used psychotropic drugs to control inmates even when there was no suspicion of mental problems. These drugs were used as a form of management control. It was also common knowledge that nurse Hodges was one of the people who would inject inmates with tranquilizers at the request of sheriff's deputies.

Irvin did not recall the first name of Hodges. However, Irvin has been looking for Hodges in order to gain his assistance Irvin's case. Hodges should be today in his 70s. Irvin asked his own investigator to try to find Hodges, so far unsuccessfully.

Irvin also recalls a black male sheriff's deputy who worked in highpower at the same time that he and Stanley Williams were there. The deputy's last name was White and the inmates referred to him as "two flashlight White" because he always carried two flashlights. Deputy White should be able to corroborate that Petitioner was drugged in order to control him.

4. THE JUDGE, A JUROR, AND HIS MOTHER THOUGHT Petitioner WAS SPACED OUT DURING PRETRIAL DETENTION AND THE TRIAL

During pretrial proceedings the judge observed that Petitioner did not respond to his question. He asked Petitioner' stepfather if he got:

> into these moods frequently, Mr. Holiwell, where he won't speak ... I am aware that at least he's alert and looking at me. And he's not choosing

> to respond to my words. But I can't say he's understanding what I say. (RT A-15 [692].)[151]

(Williams v. Woodford, *supra*, 384 F.3d at p.604.) After Mr. Holiwell said that he had abused PCP in the past, the court ordered a psychiatric evaluation but did not hold a competency hearing. The psychiatrist "conducted only a limited interview with Williams." (Id. at p. 605)

Juror Sherry Wiseman stated that she remembered Petitioner very clearly and that:

> his demeanor was in sharp contrast to his size. He reminded me of a child. He played with his fingers and hands throughout the trial" and "seemed 'spaced out' and not all there. He looked to me as if he was on drugs ....He seemed oblivious to what was going on and in another world.[152]

Sheriff's deputies informed Ms. Wiseman that they would give him "sugar to calm him down" and "gave him cookies to keep him on an even keel." (¶ 4.)

Petitioner' mother, Ceola Williams, stated that she would visit her son two to three times a week at the county jail.

> The person I saw was not the son that I knew. He was dazed and confused, and on several occasions, did not recognize me or my husband Fred Holiwell. Mentally, he was far, far away. Often he was unable to answer even simple questions such as 'how are you?', seeming

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[151] DM Exh. 78 [687-694].

[152] *See* July 10, 1993, Declaration of Sherry Wiseman, ¶ 2, [695], DM Exh. 79.

not to understand. When he would answer, he would often lose his train of thought before finishing. He had no idea why he was in jail and at times seemed even unaware that he was in jail.[153]

5. Petitioner DOES NOT REMEMBER HIS TRIAL OR WRITING NOTES TO JAILHOUSE INFORMANT OGELSBY

Due to the forced drugging, Petitioner does not remember his trial. For that reason, he did not refer to it in his memoirs.[154] He did remember his trial counsel Joe Ingber, but has only a vague recollection of conferring with him before trial. Petitioner does remember Samuel Coleman being beaten by police as this took place prior to being drugged. However, he did not remember Coleman testifying against him. Had he been aware of what was going on he would have told Ingber about the beating and would have asked him to cross-examine Coleman about this.

While Petitioner' case was on appeal, he saw notes that jailhouse informant George Ogelsby gave to law enforcement. Although the notes appear to be in his handwriting, he does not remember writing any of them. Petitioner does not remember George Ogelsby testifying and does not even remember what Ogelsby looked like.

6. THE STATE'S PSYCHIATRIST CONCEDED THAT COUNTY JAIL INMATES ARE GIVEN "HIGH

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[153] *See* Declaration of Ceola Williams, ¶ 13 [699-700], DM Exh. 80.

[154] *See* December 1, 2005, Declaration of Stanley Williams, attached as Supp. Exh3 (HR 9.).

DOSES OF TRANQUILIZERS" THAT ARE "NOT CLINICALLY MANDATORY"

Psychiatrist Ronald A. Markman, M.D., who evaluated Petitioner for the Attorney General, conceded in a declaration in 1998, that jail authorities administer powerful tranquilizers that are "not clinically mandatory."

> [I]t is my understanding that the general practice of medical personnel in the County Jail is to **withhold on trial days[155] any medications that are not clinically mandatory that might affect a defendant's level of function or conscious awareness. High doses of tranquilizers, if administered, could have slowed his thought processes and analytic thinking**, but there would certainly have been overt signs of somnolence easily observable by untrained personnel.[156]

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[155] As a psychiatrist, Markman was certainly aware that even if Petitioner had not been given any medication on the trial day, the lingering effects of such drugs would already have taken their toll on his mental alertness.

[156] *See* May 21, 1998, declaration of Ronald Markman, ¶ 1-3, and 35 [701-703], DM Exh. 81 (emphasis added). By submitting Dr. Markman's declaration, the State was on notice that involuntary drugging of inmates with powerful tranquilizers at the county jail was a routine practice and was obliged under Brady principles to provide any and all information concerning these practices. The alleged loss or destruction of Petitioner' 1979-1981, jail medical/psychiatric/medication records is highly suspect and is a bad fath failure to preserve evidence that allowed the prosecutor to unfairly manipulate the trial. *See infra*.

As to Petitioner, however, Markman was unable to "enter a definitive opinion to a reasonable degree of medical certainty" because Petitioner could not tell him "what medications were administered"and his medical records were unavailable.[157]

7. THE CHEMICAL STRAIGHTJACKET

In 1979 to 1981 (and perhaps today), it was not unusual for prisons and jails to use powerful psychotropic medication as a type of chemical straightjacket. "Chemical solitary confinement is today the most common mode of treatment of the mentally ill .... It is also used as a straightjacket for the sane and healthy children and adults in correctional facilities." (Richard Hughes and Robert Brewin, The Tranquilizing of America: Pill Popping and the American Way of Life, 1979, p. 142.)[158]

> [M]any correctional officers and administrators 'are all too thankful for the supportive custodial role psychotherapeutic drugs play' in keeping children in line and costs down. The phenothiazines, of which the tranquilizer Thorazine, or chlorpromazine, is the most common, were being used," not "for the control of disturbed psychotic persons but, more often than not, to minimize fighting, running away, and general misbehaving, as well as for punishing and controlling. (Id. at pp. 142-143, citation omitted.)
>
> The potent tranquilizing drugs – Thorazine, Mellaril, Stelazine, Prolixin, Serentil, Triavil, Vesperin, and Haldol, to name the more common ones

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[157] DM Exh. 81, ¶ 35, p.16. [702-703]

[158] *See* Richard Hughes and Robert Brewin, The Tranquilizing of America: Pill Popping and the American Way of Life, 1979, Chapter 6, "Chemical Solitary Confinement," pp. 142-161 [706-715], DM Exh. 82.

> – unquestionably are effective in controlling behavior. When used on a large population of institutionalized persons, as they are, they can help keep the house in order with the minimum program of activities and rehabilitation and the minimum number of attendants, aides, nurses, and doctors. (Id. at p. 157.)

8. THE CALIFORNIA STATE ASSEMBLY FOUND THAT FORCED DRUGGING TO CONTROL INMATES WAS A WIDESPREAD PROBLEM IN PRISONS AND JAILS

In 1976, the California State Assembly, Select Committee on Corrections held hearings and produced a report entitled, "An Investigation into the Practice of Forced Drugging/Medication in California's Detention Facilities"("Assembly Report")[159] The State Assembly found that "Forced drugging is a widespread phenomena affecting state prisons, major county jail facilities as well as local juvenile detention centers. (Assembly Report at p. 4(a) [726].)

> Major tranquilizers have been employed for extended periods of time, greatly exceeding recommended time limitations fo use .... ¶ .... **Forced drugging/medication is being utilized as an indirect threat to the general prison population as a form of management control**. i.e. resident [sic] displaying a non-conforming type of behavior may be subjected to forced drugging/medication. (Id. at p. 5(a) [727], emphasis added.)

> In some instances there is a possibility that **forced drugging/medication has been employed solely as a form of management control**. (Id. at p. 7(a) [729], emphasis added.)

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[159] A copy of the Assembly Report is DM Exh. 83 [716-857].

The State Assembly found that powerful tranquilizers were being administered involuntarily and surreptitiously. "Few, if any, residents and former residents on forced drugging/medication were ever told the reasons for being placed on the drug or medication, or the ramifications of the use of the particular drug or medication." (Id. at p. 6(a) [728].).

The State Assembly recommended that "psychiatric medication should never be given in a covert or disguised fashion," the inmate should have the right to his own psychological records, and that "there should be no retaliation carried out by prison authorities on any resident who refuses to take medication." (Id. at p. 10(a) [732].)

Psychiatrist, Dr. Lee Coleman testified before the State Assembly that dangerous and powerful psychotropic medication was routinely administered "in virtually every institution" as "policy." (Id. at p.42 [778].) Drugs were given to inmates without a psychiatric diagnosis but as a form of control. (Id. at p. 23, 35 [759, 771].)

> Dr. Coleman: [If an inmate is a] **problem in the prison for one reason or another, the heavy tranquilizers get used as agents of control, there just isn't any question about it**. Thorazine, Stelazine, Mellaril, and of course, the wonder drug of them all all Prolixin because you can inject it and you only have to go back two or three weeks later to inject it again. You know the **psychiatric and drug professions are proud of this. They advertise the advantages of certain drugs**. For example some of the liquid forms, they advertise how **convenient they are because they can be placed into the client's food or the**

prisoner's food and they won't know it. You don't taste it, you don't smell it and so you avoid any problems of hassling with the person. So the way it happens is one of those methods. **You get that label put on you, you're considered to be troublesome in some way ... then you get put on a variety of medications** and if the result is not what they want then they juggle them. You know they will try you on Thorazine and then they increase that and then they drop that and try Polixin or Stelazine and so forth and so on. (Id. at p. 35 [771], emphasis added.)

Chairman Alatorre: ....Another area that troubles me is the fact that **I could be eating and drugs could be put in my food** .... (Id. at p. 35 [771], emphasis added.)

Dr. Coleman: ... They can **put it in juice**, that is a very common form, you see what typically happens is that they put you on pills, they don't particularly want to give everybody shots because that is just a lot of work. They will put you on pills, Thorazine, Stelazine, Prolixin or something like that, **if you don't take it, or you're troublesome, if you check [sic] it, or you try to spit it out, put in the toilet, throw it away or something, they will start giving you the concentrate because they can stand there and watch and they can insist that you open your mouth and if you don't have any liquid in your mouth they know that you have taken it. If you refuse to do that, then you can get the shot of Prolixin which lasts for a couple of weeks and you're chemically controlled for that period of time**. (Id. at pp. 36-37 [772-773], emphasis added.)

CLAIMS FOR RELIEF

Claim One

THE PROSECUTION FAILED TO DISCLOSE THAT THE SHOTGUN EVIDENCE WAS UNRELIABLE UNDER STANDARD FIREARMS EXAMINATION TECHNIQUES

If a jury heard that the firearms examiner's opinion was highly unreliable and junk science at best, given that the only other evidence against Petitioner was false and/or highly unreliable informant testimony, 'it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.'" (Schlup, 513 U.S. at 327.)

It is well settled that prosecutors must disclose all material impeachment evidence that casts doubt upon the credibility of its witnesses. (Brady v. Maryland (1963) 373 U.S. 83; Giglio v. United States (1972) 405 U.S. 150; United States v. Agurs (1976) 427 U.S. 97; United States v. Bagley (1985) 473 U.S. 667; Kyles v. Whitley (1995) 514 U.S. 419.)

Evidence is material if 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. (Bagley, 473 U.S. at 682; Kyles v. Whitley, 514 U.S. at p. 434.) The final

determination of materiality is based on the 'suppressed evidence considered collectively, not item by item.' (Kyles v. Whitley, 514 U.S. at p. 436-37.) (Paradis v. Arave (9thCir. 2001) 240 F.3d 1169, 2001 U.S. App. LEXIS 3349 [*15].)

In addition to the declaration of firearm expert David Lamagna (DM Exh. 1) explaining why the firearms evidence is highly unreliable, the extensive prosecutorial and police misconduct in this case raises suspicions that Warner's testimony was untrue.

False forensic evidence often leads to wrongful convictions. For example, in Miller v. Pate (1967) 386 U.S. 1, the defendant was not permitted to scientifically inspect the physical evidence prior to his trial for murdering an 8 year old girl during a brutal sexual assault. There were no eyewitnesses and a "vital component"of the state's case was a pair of men's underwear covered with large, dark, reddish brown stains. (Id. at p. 3.) The prosecutor argued that Miller had worn these shorts during the attack and a chemist of the State Bureau of Crime identification testified that the reddish stain on the shorts was human blood. (Id. at p. 4.)

A federal habeas court permitted Miller to have the shorts examined by a chemical microanalyst who determined that "the reddish-brown stains on the shorts were not blood, but paint." (Miller v. Pate, *supra,* 386 U.S. at p. 5.) In fact, the prosecutor "had known at the time of the trial that the shorts were stained with paint....

the Canton police has prepared a memorandum attempting to explain 'how this exhibit contains all the paint on it.'" (Id. p. 6.) The United State Supreme Court reversed the judgment on Fourteenth Amendment grounds because Miller's conviction had been obtained by the knowing use of false evidence. (Id. at p. 7.)

It must not be forgotten that Deputy Warner's original opinion was inconclusive. He changed his opinion without a scientific basis for doing so after being directed to perform the tests again by DDA Robert Martin (DM Exh. 1 at 19-20, ¶ 11) who was found by this Court to be dishonest on two previous occasions. (People v. Fuentes (1991) 54 Cal.3d 707, 720 [DDA Martin's answers to trial court were "very spurious."] and People v. Turner (1986) 42 Cal.3d 711, 725 [DDA Martin's answers to trial court were "not bona fide."].) In Fuentes, Justice Mosk lamented that:

> this court attempted to teach this same prosecutor that invidious discrimination was unacceptable when we reversed a judgment of death because of similar improper conduct on his part. **He failed – or refused – to learn his lesson**. (Fuentes, 54 Cal.3d at p. 722, emphasis added.)

It would appear that DDA Martin had not learned his lesson by the time of Petitioner trial either.

Claim Two

TRIAL COUNSEL FAILED TO RETAIN HIS OWN EXPERT TO EVALUATE AND TEST THE FIREARMS EVIDENCE

Given that the firearms evidence is the only physical evidence in the case and the other witnesses were criminal informants with incentives to lie to protect their own interests, had trial counsel conducted his own testing, no reasonable juror would have found Petitioner' guilty beyond a reasonable doubt.

If a jury heard that the firearms examiner's opinion was highly unreliable and junk science at best, given that the only other evidence against Petitioner was false and/or highly unreliable informant testimony, "it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt." (Schlup, 513 U.S. at 327.) Ordinarily, ineffective assistance of counsel claims are governed by the standards set forth in Strickland v. Washington (1984) 466 U.S. 668, 687, which require a showing of both deficient performance by the attorney and resulting prejudice to the defense. "The defendant must show that counsel's performance fell below an objective standard of reasonableness." (Id. at p. 688.) The defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (Id. at p. 689.) As to prejudice, the defendant must show that there is a "reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Id. at p. 694.) "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (Id. at p. 686.)

Strickland v. Washington recognized that "actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice .... prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." (466 U.S. at p. 692, citing United States v. Cronic (1984) 466 U.S. 648, 658-59, emphasis added. *Accord* In re Ledesma (1987) 43 Cal.3d 171, 217.)

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." (United States v. Cronic, 466 U.S. 648, 655.) "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." (Id. at p. 656.) "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt." (Id. at p. 656, n.19.) If "counsel entirely fails

to subject the prosecution's case to meaningful adversarial testing, there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." (Id. at p. 659.)

Trial counsel could have tested the firearms evidence at the inception of the case. (CT 16.) However, from 1979 to 1981, the defense did not request funds for its own firearms expert and the testing was not done then or since.

The courts have consistently held that lawyers who fail to obtain necessary experts deprive their clients of the effective assistance of counsel. (*See e.g.* In re Cordero (1988) 45 Cal.3d 88 [murder conviction overturned for failure to investigate and present expert testimony]; Bloom v. Calderon (9thCir. 1997) 132 F.3d 1267 [capital case conviction thrown out when defense counsel hired an expert only days before trial started]; Harris v. Wood (9thCir. 1995) 64 F.3d 1432 [capital case conviction overturned when defense counsel, *inter alia,* failed to retain independent ballistics or forensic experts]; Bess v. Legursky (W. Va. 1995) 465 S.E.2d 892 [murder conviction overturned when defense counsel failed to present pathology and forensic experts]; Winn v. State (Tex. Ct. App. 1993) 871 S.W.2d 756 [murder conviction overturned when counsel failed to procure expert medical testimony]; Goad v. State (Tenn. 1996) 938 S.W.2d 363 [death sentence overturned when counsel failed to present expert testimony]; Rose v. State (Fla. 1996) 675 So.2d 567 [death sentence

overturned for failure to present expert testimony]; Middleton v. Dugger (11th Cir. 1988) 849 F.2d 491 [conviction overturned for failure to investigate and present expert testimony]; Wickline v. House (W.Va. 1992) 424 S.E.2d 579 [same]; Frias v. State (Wyo. 1986) 722 P.2d 135 [same]; Wilhoit v. State (Okla. Crim. App. 1991) 816 P.2d 545 [same]; People v. Danley (Colo. Ct. App. 1988) 758 P.2d 686 [conviction overturned for failure to investigate and present expert witness and for having defendant testify as his own "expert"]; Commonwealth v. Stonehouse (Pa. 1989) 555 A.2d 772 [murder conviction overturned for failure to present expert on battered women's syndrome].)

Because the firearms evidence is the only physical evidence linking Petitioner to these crimes – there is a reasonable probability, that but for trial counsel's failure to conduct his own testing, Petitioner would not have been convicted. (Strickland v. Washington, *supra*, 446 U.S. 694.)

Claim Three

THE PROSECUTION FAILED TO DISCLOSE ANY INFORMATION ABOUT THE CIRCUMSTANCES OF THE DEATH OF GREGORY WILBON, JAMES GARRETT'S CRIME PARTNER, THUS DEPRIVING PETITIONER OF THE OPPORTUNITY TO MOUNT A DEFENSE THAT GARRETT WAS THE TRUE KILLER OF BOTH WILBON AND THE YANG FAMILY AND THAT GARRETT FALSELY ACCUSED PETITIONER IN ORDER TO

DEFLECT SUSPICION AWAY FROM HIMSELF FOR BOTH OF THESE MURDERS

If a jury heard that James Garrett could not possibly have had an alibi for the night that Wilbon was killed (because the body was "markedly decomposed" and time of death not determined), combined with the circumstances of Wilbon's death (shot and then being placed in the trunk of a car) being a modus operandi of Garrett (the Gallo wine truck driver being placed in the trunk of a car), Petitioner would have been able to mount a credible defense that Garrett was the likely murderer of the Yang family. Furthermore, the jury would not have believed anything Garrett said about the 7-11 murder (Petitioner's alleged confession). The jury would have believed that the "sloppy," "slovenly," and "shoddy" police investigation "raised the possibility of fraud." (Kyles v. Whitley, 514 U.S. at p. 442, 446.) Had the Wilbon evidence been disclosed, 'it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.'" (Schlup, 513 U.S. at 327.)

A. The State Must Be Especially Cautious in Investigating and Disclosing Impeachment Material about Informants

"When the state relies on the testimony of a criminal informant, it has an obligation to disclose 'all information bearing on that witness's credibility." (Carriger v. Stewart (9thCir. 1997) 132 F.3d 463, 480.)

It is also well settled that prosecutors have a **duty to look for** evidence that casts doubt on the credibility of their witnesses. (Kyles v. Whitley, *supra*, 514 U.S. 419; In re Brown (1998) 17 Cal.4th 873.) "The "responsibility for Brady compliance lies exclusively with the prosecution, including the "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." (In re Brown, *supra*, 17 Cal.4th at p. 952, citing Kyles v. Whitley (1995) 514 U.S. 419.)

The Supreme Court emphasized that federal law has long "declined to draw a distinction" between government agencies for Brady purposes as the duty falls to the entire "prosecution team," which includes both investigative and prosecutorial personnel. (In re Brown, *supra*, 17 Cal.4th at p. 879.) "The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation. (Ibid.)

Most important, "[t]he prosecutor charged with discovery obligations cannot avoid finding out what 'the government' knows, simply by declining to make reasonable inquiry of those in a position to have relevant knowledge." (In re Brown, *supra*, 17 Cal.4th at p. 879, n.3, citing United States v. Osorio (1st Cir. 1991) 929 F.2d 753, 761.) "A prosecutor's office cannot get around Brady by keeping itself in ignorance, or compartmentalizing information about different aspects of a case." (In

re Brown, *supra*, 17 Cal.4th at p. 879, citing Carey v. Duckworth (7th Cir. 1984) 738 F.2d 875, 878.) The prosecutor's duty is nondelegable, at least to the extent the prosecution remains responsible for any lapse in compliance. (In re Brown, 17 Cal.4th. at p. 881.)

> It is important that the prosecutors, who possess the requisite legal acumen, be charged with the task of determining which evidence constitutes Brady material that must be disclosed to the defense. A rule requiring the police to make separate, often difficult, and perhaps conflicting, disclosure decisions would create unnecessary confusion. (In re Brown, 17 Cal.4th at p. 881, *citing* Walker v. City of New York (2d Cir. 1992) 974 F.2d 293, 299.)

"The principles that Brady and its progeny embody are not abstractions or matters of technical compliance. The sole purpose is to ensure the defendant has all available exculpatory evidence to mount a defense." (In re Brown, 17 Cal.4th at p. 881, citations omitted.) The prosecutor's Brady obligations:

> serve 'to justify trust in the prosecutor as 'the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done. It also tends to preserve the criminal trial, as distinct from the prosecutor's private deliberations ... as the chosen forum for ascertaining the truth about criminal accusations. (Brown, 17 Cal.4th at p. 883.)

When it comes to informants, prosecutors must do more than disclose exculpatory information – they must fully investigate whether the exculpatory information ultimately proves these witnesses are lying to save themselves.

(Commonwealth of Northern Marian Islands v. Bowie (9thCir. 2001) 243 F.3d 1109, 1122-1123, amended, 236 F.3d 1083.) Nor can the prosecutor blame the defense attorney for the failure of exculpatory information to come before the jury.

> The prosecution has a "duty" to "protect the trial process against fraud ....defendants cannot waive the freestanding ethical and constitutional obligation of the prosecutor as a representative of the government to protect the integrity of the court and criminal justice system. (Bowie, *supra*, 243 F.3d at p. 1122.)
>
> **Few things are more repugnant to the constitutional expectations of our criminal justice system than covert perjury, and especially perjury that flows from a concerted effort by rewarded criminals to frame a defendant.** The ultimate mission of the system upon which we rely to protect the liberty of the accused as well as the welfare of society is to ascertain the factual truth, and to do so in a manner that comports with due process of law as defined by our **Constitution. This important mission is utterly derailed by unchecked lying witnesses, and by any law enforcement officer or prosecutor who finds it tactically advantageous to turn a blind eye** to the manifest potential for malevolent disinformation. (Bowie, *supra*, 243 F.3d at p. 1114, emphasis added.)
>
> The authentic majesty in our Constitution derives in large measure from the rule of law – principle and process instead of person. Conceived in the shadow of an abusive and unanswerable tyrant who rejected all authority save his own, our ancestors wisely birthed a government not of leaders, but of servants of the law. Nowhere in the Constitution or in the Declaration of Independence, nor for that matter in the Federalist or in any other writing of the Founding Fathers, can one find a single utterance that could justify a decision by any oath-beholden servant of the law to look the other way when confronted by the real possibility of being complicit in the wrongful use of false evidence to secure a conviction in court. (Bowie, *supra*, 243 F.3d at p. 1124.)

In regard to exculpatory evidence, it is important to emphasize that the prosecution's duty to disclose is not extinguished after the defendant is convicted. (People v. Gonzalez (1991) 51 Cal.3d 1179, 1260-1261, relying on Imbler v. Pachtman (1976) 424 U.S. 409, 427, fn. 25; Thomas v. Goldsmith (9thCir. 1992) 979 F.2d 746, 749-750; People v. Garcia (1993) 17 Cal.App.4th 1169.) The prosecution cannot profit from its own wrongdoing because it took the defense too long to catch them. (Banks v. Dretke, *supra*, 540 U.S. 668.)

> The state cannot satisfy its Brady obligation to disclose exculpatory and impeachment evidence by making some evidence available and asserting that the rest would be cumulative. Rather, the state is obligated to disclose all material information casting doubt on a government witness' credibility. (Benn v. Lambert, *supra*, 283 F.3d at 1057-1058.)

> It must never be forgotten that a public prosecutor,
>
> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done .... [i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (Berger v. United States (1935) 295 U.S. 78, 88.)
>
> In our justice system, the prosecuting attorney occupies a special position of public trust. Courts, citizens, and even criminal defendants must rely on these public servants to be honorable advocates both for the community on whose behalf they litigate and for the justice system of which they are an integral part. When prosecutors betray their solemn obligations and abuse the immense power they hold, the fairness of our entire system of justice is called into doubt and public confidence is

> undermined." (Silva v. Brown (9thCir. 2005) 416 F.3d 980 [habeas corpus petition re death sentence granted after prosecution failed to disclose that it had made a deal with a key witness, whose competency was in question, to refrain from undergoing a psychiatric evaluation before testifying].

B. A Shoddy, Slovenly, and Sloppy Police Investigation Raises the Possibility of Fraud

In Kyles v. Whitley (1995) 514 U.S. 419, 446, 115 S.Ct. 1555, the United States Supreme Court held that attacking the reliability of the prosecution's investigation may be critical to a competent defense.

> When, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it. (Id. at 446, n.15.)

In Kyles, the withholding of exculpatory evidence prevented the defense from attacking the reliability of the police investigation: *the police deliberately overlooked the obvious fact that their principle witness may have been the killer himself* and may also have planted incriminating evidence. Id. at 446 *citing e.g*. Bowen v. Maynard (10th Cir. 1986) 799 F.2d 593, 613 ["A common tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation"] and Lindsey v. King (5th Cir. 1985) 769 F.2d 1034, 1042 [awarding new trial of prisoner convicted in

Louisiana state court because withheld Brady evidence "carried with it the potential ... for the ... discrediting of the police methods employed in assembling the case."].

In United States v. Sager (9thCir. 2000) 227 F.3d 1138, the Ninth Circuit held it was plain error for the district court to instruct a jury not to "grade" the prosecution's investigation. Id. at 1145.

> In one breath the court made clear that the jury was to decide questions of fact, but in the other, the court muddled the issue by informing the jury that it could not consider possible defects in [the officer's] investigation. To tell the jury that it may assess the product of an investigation, but that it may not analyze the quality of the investigation that produced the product, illogically removes from the jury potentially relevant information.

(Sager, 227 F.3d at 1145, citing Kyles v. Whitley, 514 U.S. at p. 446, n.15 and 442, n.13 ["discussing the utility of attacking police investigations as 'shoddy'"].)

The Ninth Circuit held that "details of the investigatory process potentially affected Inspector Morris' credibility and perhaps more importantly, the weight to be given to the evidence produced by his investigation." (Sager, 227 F.3d at 1445; *accord*, United States v. Hanna (9thCir. 1995) 55 F.3d 1456, 1459-1461 [evidentiary hearing ordered to determine whether police officer "misled" another officer and "may have tried in his report to mislead his department and his Lieutenant" -- "we are concerned by the obvious discrepancies between the police report filed by Sgt. Crenshaw (who also violated police procedure) and his testimony at trial; and we are

mindful that a police report recording the events surrounding the arrest of a citizen is an important official document required to be accurate, and not misleading."]; and Carriger v. Stewart (9thCir. 1997) 132 F.3d 463, 481 [had evidence about informant's background and credibility been disclosed, "the defense could have used it to question the thoroughness or good faith of an investigation that did not include [the informant] as a suspect."])

C. A Claim of Actual Innocence May Be Predicated upon the Suppression of Impeachment Material about an Informant Who May Have Been the Real Killer May

In Carriger v. Stewart (9thCir. 1997) 132 F.3d 463 (en banc), the Ninth Circuit granted habeas relief in a capital case where Carriger's defense was that the chief prosecution witness, Robert Dunbar, testifying under a grant of immunity, was the real murderer. (Id. at 465.) After trial and an unsuccessful appeal, Carriger learned of undisclosed documents in the state's records that showed that Dunbar was a longtime violent criminal, was a known habitual liar who had a habit of blaming others for his own crimes. (Ibid.) After Carriger's first federal habeas was filed Dunbar confessed in open court that he was the murderer and that Carriger was innocent. (Ibid.) After so testifying, Dunbar then wrote the judge a letter recanting his in court confession. (Id. at p. 467.)

Initially, the Ninth Circuit held en banc that the discovery of the Dunbar impeachment material came too late and that he had not shown actual innocence or sufficient doubt about guilt to overcome procedural bars. (132 F.3d at p. 465.) This decision was handed down well before Banks v. Dretke. The Ninth Circuit took the case en banc again, "because of the exceptional importance concerning whether the state may execute an individual whose guilt is shrouded by doubt and who has raised claims of constitutional error at trial." (Id. at p. 466.)

In granting a new trial, the Ninth Circuit noted that the physical evidence was not strong and that nearly all of it was given to the police by Dunbar the morning following the crime. (Id. at p. 466.) Dunbar was a longtime police informant who also helped the police with its investigation. (Id. at p. 469-470.)

The district court held that Carriger had not shown actual innocence under Schlup v. Delo. The state had pointed to the fact that Carriger's fingerprint was on some tape binding the victim's hands, an attache case key was found in Carriger's property, discarded clothes with the inside pockets removed where Carriger customarily placed his initials, Carriger's prints were on the gun case, and boots worn during the robbery. (Id. at p. 473.) The Ninth Circuit, however, found that this evidence was also consistent with Dunbar's sworn confession. (Ibid.)

The Ninth Circuit held that although Carriger had not proven actual innocence to satisfy Herrera v. Collins, he had "more than shown sufficient doubt about the validity of his conviction to satisfy Schlup and permit consideration of his constitutional claims. It is more likely than not that no reasonable juror hearing all of the now-available evidence would vote to convict Carriger beyond a reasonable doubt. (Id. at p. 478.) The court noted, inter alia, that Dunbar's repudiated confession described accurate details about the crime and that he had a long history, known to state authorities, of lying to police and trying to pin his crimes on others. (Id. at p. 479.)

Relief was warranted because Carriger had a strong Brady claim due to the withheld impeachment evidence in the state's corrections file. (Id. at p. 479.)

> Dunbar was the prosecution's star witness, and was known by police and prosecutors to be a career burglar and six-time felon, with a criminal record going back to adolescence. When the state decides to rely on the testimony of such a witness, it is the state's obligation to turn over all information bearing on that witness' credibility. This must include the witness' criminal record, including prison records, and any information therein which bears on credibility. The state had an obligation, before putting Dunbar on the stand, to obtain and review Dunbar's corrections file, and to treat its contents in accordance with the requirements of Brady and Giglio. (Id. at p. 480, citations omitted.)

In regard to the undisclosed evidence, the Ninth Circuit faulted the district court for finding that Carriger had not been prejudiced because the jury already knew Dunbar

was a burglar testifying with immunity. "The telling evidence that remained undisclosed included the length of Dunbar's record of burglaries, and more important, his long history of lying to the police and blaming others to cover up his guilt." (Id. at p. 481.) We conclude there is more than a reasonable probability that the outcome of Carriger's trial would have been different had Dunbar's records been disclosed. The result was a verdict not worthy of confidence and a trial that denied Carriger due process of law. Carriger is entitled to a new trial." (Id. at p. 482.)

Claim Four

THE FALSE AND/OR PERJURED TESTIMONY SHERIFF SERGEANT GILBERT GWALTNEY ESTABLISHING AN ALIBI FOR JAMES GARRETT IN THE DEATH OF GARRETT'S CRIME PARTNER GREGORY WILBON WHICH THE PROSECUTOR KNEW OR SHOULD HAVE KNOWN WAS FALSE AND/OR PERJURED

Had the jury known not only that James Garrett could not possibly have had an alibi for the night that Wilbon was murdered (because his body was "markedly decomposed") and that the circumstances of his death (being placed in the trunk of a car) was a modus operandi of Garrett – but had also known that Sgt. Gwaltney was willing to commit perjury and/or intentionally lie under oath to protect Garrett – "it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.'" (Schlup, 513 U.S. at p. 327.)

It is well settled that the prosecution's knowing use of perjured testimony is a violation of due process. (Mooney v. Holohan (1935) 294 U.S. 103; Alcorta v. Texas (1957) 355 U.S. 28; Pyle v. Kansas (1942) 317 U.S. 213; Miller v. Pate (1967) 386 U.S. 1; Napue v. Illinois (1959) 360 U.S. 264, 265.)

Under California law, a state habeas corpus Petitioner is not required to prove that false or perjured testimony was "knowingly" used by the prosecution in order to obtain relief. (Penal Code, § 1473; In re Hall (1981) 30 Cal.3d 408, 424, 179 Cal.Rptr.223; In re Wright (1978) 78 Cal.App.3d 788, 807-809, 144 Cal.Rptr. 535.)

In federal court, materially false testimony is such an affront to justice that even when a prosecutor is ignorant of it, reversal is still required. (Killian v Poole (9thCir. 2001) 282 F.3d 1204; United States v. Young (9thCir. 1994)17 F.3d 1201 ["government's assurances that false evidence was presented in good faith are little comfort to a criminal defendant wrongly convicted on the basis of such evidence]; Sanders v. Sullivan (2d Cir. 1988) 863 F.2d 218, 224 ["It is simply intolerable ... if a state allows an innocent person to remain incarcerated on the basis of lies." United States v. Wallach (2nd Cir. 1991) 935 F.2d 445, 473.)

False evidence is material if there is a "reasonable probability" that had it not been introduced, the result would have been different. (In re Sassounian (1995) 9 Cal.4th 535, 546, relying on United States v. Bagley (1985) 473 U.S. 667, 678.) A new

trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial resulting in a verdict worthy of confidence. (Hall v. Director (9thCir. 2003) 343 F.3d 976, 983-948, citing Giglio, 405 U.S. at p. 154, Napue, 360 U.S. at p. 271; and Kyles v. Whitley, 514 U.S. at p. 434.)

In Hall, *supra*, 343 F.3d 976, it was revealed post-trial that correspondence introduced into evidence between a jailhouse informant and the defendant had been altered by the informant's erasures.

> Hall does not claim that the prosecution knew that the jail-house notes were false at the time they were admitted into evidence; however, Hall does argue that to allow his conviction to stand, based on the present knowledge that the evidence was falsified, is a violation of his right to due process under the Fourteenth Amendment. (Hall v.Director, 343 F.3d at p. 981.)

The Ninth Circuit held that "Because false and material evidence was admitted at Hall's trial in violation of his due process rights, we reverse the judgment of the district court with instructions that it should issue an unconditional writ of habeas corpus ...." (Hall, 343 F.3d at 985.)

In Hayes v. Brown (9thCir. 2005) 399 F.3d 972 (en banc), the Ninth Circuit reversed the denial of a death row inmate's habeas petition because the prosecutor

contrived with an informant's defense attorney to hide a deal with the informant. As a result, false evidence was introduced into the trial which the prosecutor failed to correct.

> Before trial, the prosecutor had reached an agreement with [the informant's] attorney to grant transactional immunity for the Patel killing and to dismiss the other pending unrelated felony charges against [the informant]. However, the State wished to keep the promise to dismiss the felony charges away from the trial judge and jury. Therefore, the prosecutor extracted a promise from [the informant's] attorney that he would not tell [the informant] about the deal. The idea was that James would be able to testify that there was no deal in place, without perjuring himself, because [the informant] would not personally be informed of the arrangement. (Hayes v. Brown, 399 F.3d at 977.)

The Ninth Circuit held that the State had nevertheless "knowingly presented false evidence to the jury and made false representations to the trial judge as to whether the State had agreed not to prosecute [the informant] on his pending felony charges." (Hayes v. Brown, 399 F.3d at p. 978.) The Ninth Circuit criticized the Attorney General for contending "that it is constitutionally permissible for it knowingly to present false evidence to a jury in order to obtain a conviction, as long as the witness used to transmit the false information is kept unaware of the truth." (Id. at 981.) "[C]ontrary to the state's theory, that the witness was tricked into lying on the witness stand by the State does not, in any fashion, insulate the State from conforming its conduct to the requirements of due process." (Ibid.)

> The fact that the witness is not complicit in the falsehood is what gives the false testimony the ring of truth, and makes it all the more likely to affect the judgment of the jury. That the witness is unaware of the falsehood of his testimony makes it more dangerous, not less so. (Hayes v. Brown, 399 F.3d at 981.)

The court of appeal said it was assuming that the informant was unaware of the deal. It emphasized, however, that "in preparing [the informant] for his testimony, [the informant's] counsel – who did know about the deal – might have influenced the content of that testimony, deliberately or not." (Hayes v. Brown, 399 F.3d at p. 981, n.1.) "There is nothing redemptive about the sovereign's conspiring to deceive a judge and jury to obtain a tainted conviction." (Id. at 981.)

> The rule has been clear for decades: a criminal defendant is denied due process of law when a prosecutor either knowingly presents false evidence or fails to correct the record to reflect the true facts when unsolicited false evidence is introduced at trial. (Hayes v. Brown, 399 F.3d at p. 984.)

> In closing, we must observe that this case is not merely about a peculiar circumstance. As we have noted, this is not the first time we have been confronted in recent years with schemes to place false or distorted evidence before a jury. Our criminal justice system depends on the integrity of the attorneys who present their cases to the jury. When even a single conviction is obtained through perjurious or deceptive means, the entire foundation of our system of justice is weakened. (Hayes v. Brown, 399 F.3d at p. 988.)

Claim Five

> THE PROSECUTION FAILED TO DISCLOSE THAT ALFRED COWARD WAS NOT A UNITED STATES CITIZEN AND THAT HE HAD A HISTORY OF PROSECUTION FOR VIOLENT CRIMES,

THUS DEPRIVING PETITIONER OF THE OPPORTUNITY TO MOUNT A DEFENSE THAT ALFRED COWARD WAS THE TRUE KILLER OF ALBERT OWENS AND THAT HE FALSELY ACCUSED Petitioner IN ORDER TO DEFLECT SUSPICION AWAY FROM HIMSELF

Had the jury known that Alfred Coward was not a United States citizen and thus had an additional motive to lie, and if it had known that he already had a lengthy history of violent criminal behavior involving guns, it would not have believed his testimony implicating Petitioner in the 7-11 murder of Albert Owens. Had the jury heard this evidence, 'it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.'" (Schlup, 513 U.S. at p. 327.)

Claim Six

THE PROSECUTION'S FAILURE TO DISCLOSE THAT PETITIONER WAS FORCIBLY, INVOLUNTARILY, SURREPTITIOUSLY, AND CONTINUOUSLY DRUGGED WITH POWERFUL TRANQUILIZERS AND/OR OTHER PSYCHOTROPIC MEDICATION BY THE LOS ANGELES COUNTY JAIL AS A FORM OF MANAGEMENT CONTROL, THUS PERMITTING JAILHOUSE INFORMANT GEORGE OGELSBY TO MANIPULATE AND TRICK HIM INTO WRITING NOTES THAT PURPORTED TO PLAN AN ESCAPE

It goes without saying that inmates who are being drugged by powerful tranquilizers are easy prey for other unscrupulous inmates. Numerous notes written by Petitioner to jailhouse informant Ogelsby were introduced at trial purporting to show that Petitioner planned an escape. However, because Petitioner was sedated by

powerful tranquilizers, Ogelsby was free to manipulate Petitioner who would have had no idea what was going on. A well-known *modus operandi* of jailhouse informants is to procure notes from vulnerable inmates by trickery. Recently, in Hall v. Director of Corrections (9thCir. 2003) 343 F.3d 976, a murder conviction was overturned after the jailhouse informant confessed that he had written Hall questions to which Hall had responded in writing. The informant erased and altered the questions so that the answers appeared incriminating. (Id. at pp. 981-985.)

If the jury had heard that Petitioner was drugged with powerful tranquilizers and/or other psychotropic medication, and that a modus operandi of jailhouse informants is to procure notes from vulnerable inmates by trickery, no reasonable juror would have believed anything that Ogelsby testified about. Nor would the jury have believed any of the handwritten notes to be incriminating. Had the jury heard this evidence, "it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt." (Schlup, 513 U.S. at p. 327.)

A prisoner has a "liberty interest in the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." (Washington v. Harper (1990) 494 U.S. 210, 222.)

> Psychotropic (or antipsychotic) drugs [these include thorazine, prolixin, stelazine, serentil, quide, tindal, compazine, trilafon, repose, mellaril, tractan, navane, haldol, moban, and vesprin] have become a primary tool

> of public mental health professionals ....They also possess a remarkable potential for **undermining individual will and self-direction, thereby producing a psychological state of unusual receptiveness to the directions of custodians**. (Keyhea v. Rushen (1986) 178 Cal.App.3d 526, 530 and fn.1, citations omitted, emphasis added.)

> The drugs also, however, have many **serious side effects**. Reversible side effects include akathesia (a distressing urge to move), akinesia (a reduced capacity for spontoneity), speudo-Parkinsonism (causing retarded muscle movements, masked facial expression, body rigidity, tremor, and a shuffling gait), and various other complications such as muscle spasms, blurred vision, dry mouth ..... and, on rare occasions, sudden death. A potentially permanent side effect of long-term exposure, for which there is no cure, is tardive diskenesia, a neurological disorder manifested by involuntary, rhythmic, and grotesque movements of the face, mouth, tongue, jaw, and extremities. (Keyhea v. Rushen, *supra*, 178 Cal.App.3d at p. 530, emphasis added.)

> The demeanor often associated with mental illness – shuffling gait, rigid body movements, restlessness, and staring – may be caused by medication rather than by the illness itself. (Keyhea v. Rushen, *supra*, 178 Cal.App.3d at p. 530, n. 2.)

"Involuntary medication with antipsychotic drugs poses a serious threat to a defendant's right to a fair trial." (Riggins v. Nevada (1992) 504 U.S. 127, 138, Kennedy, J., concurring.) "[A]bsent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering antipsychotic medicines...." (Ibid.)

> When the State commands **medication during the pretrial and trial phases of the case for the avowed purpose of changing the defendant's behavior, the concerns are much the same as if it were alleged that the prosecution had manipulated material evidence**.

(Riggins v. Nevada, *supra*, 504 U.S. at p. 138, Kennedy, J., concurring, citing Brady v. Maryland, *supra*, 373 U.S. at p. 87 ["suppression by the prosecution of material evidence favorable to the accused violates due process"] and Arizona v. Youngblood (1988) 488 U.S. 51, 58 ["bad faith failure to preserve potentially useful evidence constitutes a due process violation."] emphasis added.)

In Sell v. United States (2003) 539 U.S. 166, the United States Supreme Court reversed a lower court order approving involuntary medication of a defendant to render him competent to stand trial. The "involuntary administration of drugs solely for trial competence purposes" would be justified in only "rare" instances. (Id. at p. 180.)

Of course, in Petitioner' case, the State failed to seek any permission before administering powerful psychotropic medication, failed to disclose that they were doing so, and suppressed his medical/ psychiatric/ medication records so that he could not prove this was being done to him.

It matters not that county jail officials believed in their minds that Petitioner posed trouble due to his size and perceived reputation, and therefore needed to be sedated. County officials forcibly drugged him without seeking permission from any court and then suppressed all records of having done so.

Claim Seven

THE PROSECUTION'S FAILURE TO DISCLOSE THAT PETITIONER WAS FORCIBLY, INVOLUNTARILY,

SURREPTITIOUSLY, AND CONTINUOUSLY DRUGGED WITH POWERFUL TRANQUILIZERS AND/OR OTHER PSYCHOTROPIC MEDICATION BY THE LOS ANGELES COUNTY JAIL AS A FORM OF MANAGEMENT CONTROL, THUS RENDERING HIM INCOMPETENT TO STAND TRIAL

It is indisputable that "[c]ompetence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial." (Drope v. Missouri (1975) 420 U.S. 162, 171-172.) A defendant is incompetent unless he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." (Cooper v. Oklahoma (1999) 51 U.S. 348, 354, citing Dusky v. United States (1960) 362 U.S. 402) Here, the issue of competency relates directly to actual innocence.

Petitioner' competency to stand trial while being forcibly drugged relates to Samuel Coleman's beating. One of the reasons that the Ninth Circuit gave for finding Samuel Coleman's testimony not to be coerced, was the fact that Petitioner knew that Coleman had been beaten. "Thus, defense counsel might have cross-examined Coleman about the coercive police tactics employed at his 1979 interrogation." (Williams v. Woodford, *supra*, 384 F.3d at p. 596.) Petitioner does recall Coleman's beating in the jail after the two had been arrested.[160] Had he not been drugged, and

[160] DM Exh. 77, pp. 201-202 [674-675].

instead been fully aware of what was going on in his trial he would have told Mr. Ingber to cross examine Samuel Coleman about the beating.

Had the jury heard that Samuel Coleman was severely beaten by the police before implicating Petitioner, no reasonable juror would have believed anything Coleman said. Had the jury heard this evidence, 'it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.'" (Schlup, 513 U.S. at 327.)

Claim Eight

> THE STATE'S INTENTIONAL DESTRUCTION OF EXCULPATORY EVIDENCE IN THE FORM OF HIS JAIL MEDICAL, PSYCHIATRIC, AND/OR MEDICATION RECORDS SO THAT HIS COUNSEL DID NOT KNOW AND HIS JURY DID NOT LEARN THAT HE WAS FORCIBLY, INVOLUNTARILY, SURREPTITIOUSLY, AND CONTINUOUSLY DRUGGED WITH POWERFUL TRANQUILIZERS AND/OR OTHER PSYCHOTROPIC MEDICATION BY THE LOS ANGELES COUNTY JAIL AS A FORM OF MANAGEMENT CONTROL, THUS RENDERING HIM VULNERABLE TO MANIPULATION AND TRICKERY BY A JAILHOUSE INFORMANT AND ALSO UNABLE TO COMPREHEND THE PROCEEDINGS AND/OR TO ASSIST COUNSEL IN HIS DEFENSE

The county jail forcibly drugged Petitioner with powerful tranquilizers and/or other psychotropic medication as a form of management control and then claimed to have lost or destroyed his medical/psychiatric/medication records even though they kept the records of other death row inmates who were incarcerated at the county jail

at the same time. This destruction of his medical/psychiatric/medication records was the intentional destruction of exculpatory evidence.

In California v. Trombetta, 467 U.S. 479, 81 L.Ed.2d 413, 104 S.Ct. 2528 (1984) and Arizona v. Youngblood , 488 U.S. 51, 102 l.Ed.2d 281, 109 S.Ct. 333 (1988), the Supreme Court held that due process is implicated only when the police destroy material evidence in bad faith. Material evidence is that which might be expected to play a significant role in the defense. It must also possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by any other reasonably available means.

Had the jury heard this evidence, "it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt." (Schlup, 513 U.S. at p. 327.)

Claim Nine

THE PROSECUTOR FAILED TO DISCLOSE THAT HE PROMISED ALFRED COWARD, JAMES GARRETT, AND SAMUEL COLEMAN – TACITLY OR EXPLICITLY -- THAT IF THEY GOT INTO TROUBLE WITH THE LAW AFTER Petitioner'S TRIAL HE WOULD INFORM THE APPROPRIATE AUTHORITIES THAT THEY TESTIFIED AGAINST PETITIONER WITH THE CONSEQUENCE THAT THEY COULD CONTINUE TO COMMIT VIOLENT AND OTHER CRIMES AND RECEIVE EXTRAORDINARILY LENIENT TREATMENT

As discussed above, DA Martin recently revealed that he played a winking and nodding game with James Garrett in order to deprive the jury of impeachment material by having a secret side deal with his attorney . Given that Coward, Garrett, and Coleman repeatedly continued to commit crimes – and in the case of Coward and Garrett, violent crimes – and serve very little time in jail, it is clear that they had been promised, either tacitly or explicitly, that if they got in trouble with the law, DDA Martin would help them out. Had the jury heard about these secret deals, 'it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.'" (Schlup, 513 U.S. at p. 327.)[161]

> Every prosecutor knows that competent defense attorneys will use – and appropriately so – the sweetness of the quid pro quo tendered to one defendant to testify against another as the basis of an argument to a jury that the witnesses' testimony has been compromised or purchased, and is thus suspect." (Wilhoite v. Vasquez (9thCir. 1990) 921 F.2d 247, 251 (Trott, J., concurring).)

It has been more than forty years since the United States Supreme Court held that under Brady v. Maryland (1963) 373 U.S. 83, prosecutors must fully disclose all deals given by their offices to informants who testify against criminal defendants.

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[161] Both Garrett and DDA Martin maintained that Garrett was never given a deal for his testimony against Petitioner. However, as noted above both Martin and Garrett lied. In Garrett's September 1981, probation report he told his probation officer that he "has been informed that as a result of cooperation with authorities, he has made a deal wherein he is to receive county jail sentence and possibly probation." (DM, Ex. 34, p.10 [374].)

(Giglio v. United States (1972) 405 U.S. 150.) It did not take long, however, for unscrupulous prosecutors to contrive a way to get around *Brady* and *Giglio*. Winking and nodding is the name of the game.

A. The Informant's Inherent Expectations of Leniency

As the courts have long observed, it is the [I]t is the witness' subjective expectations" that are critical to impeachment, not the actual benefit bestowed. (People v. Coyer, *supra*,142 Cal.App.3d 839, 843.) In People v. Phillips (1985) 41 Cal.3d 29, this Court pointed out that the failure to specify what benefits will be given prior to the witness' testimony not only deprives the jury of information with which to judge credibility, but encourages witnesses to lie. The witness "may be so influenced by his hopes and fears that he will promise to testify to anything desired by the prosecution" in order to get what he wants later on down the line. (Id. at 47-48.)

In Randolph v. State of California (9thCir. 2004) 380 F.3d 133, the Ninth Circuit vacated the denial of a state habeas corpus petition and remanded for further factfinding on whether a jailhouse informant was acting on behalf of the prosecution within the meaning of Massiah v. United States, (1964) 377 U.S. 201 (planting informants after counsel appointed violates Sixth Amendment); *accord* United States v. Henry (1980) 447 U.S. 264.

In Randolph, the court's decision to remand for a hearing was influenced by the fact that although prosecutors said the jailhouse informant was not explicitly promised any leniency for his testimony, he did in fact receive lenient treatment after testifying.

> For purposes of our holding, we accept as true the State's contention that Moore was told not to expect a deal in exchange for his testimony. However, *Henry* makes clear that it is not the government's intent or overt acts that are important; rather it is the 'likely ... result' of the government's acts. (Citing Henry, 447 U.S. at p. 271.) It is clear that [the jailhouse informant] hoped to receive leniency and that, acting on that hope, he cooperated with the State. [The prosecutor and detective] either knew or should have known that [the jailhouse informant] hoped that he would be given leniency if he provided useful testimony against Randolph. (Indeed, that is precisely what happened. After providing useful testimony against Randolph, [the jailhouse informant] received a sentence of probation instead of a prison term.) (Randolph, *supra*, 380 F.3d at p. 1144.)

As the Ninth Circuit has recognized, explicit denials of leniency do not end the inquiry. It is the informant's expectations, the prosecution's awareness of the informant's expectations, and the informant's ultimate benefits that are critical to the analysis. (Randolph, *supra*, 380 F.3d at p. 1144-1145.)

B. Winking and Nodding to Get Around Giglio

In Campbell v. Reed (4th Cir. 1979) 594 F.2d 4, in order to conceal the inducement to testify, the prosecutor made a deal with the accomplice's attorney to testify against defendant Campbell. For his testimony, Miller, the accomplice, would only serve two years in prison. When Miller was asked on cross-examination whether

he was going to get a lighter sentence for his testimony, Miller denied being offered a deal and said he was just doing his "civic duty." (Id. at p. 6.)

> At the request of the prosecutor, Miller's attorney did not inform him of the plea agreement prior to Campbell's trial. He did, however, tell Miller that if he testified against Campbell 'everything would be all right," and that 'there were things going on that it would be better for him not to know. (Campbell v. Reed, 549 F.2d at p. 7.)

The prosecutor did not inform Campbell or his attorney of the deal with Miller's attorney. The Fourth Circuit held that the prosecutor's failure to correct Miller's false testimony was a prejudicial denial of due process and ordered the district court to grant Campbell's habeas petition.

> In the instant case, the prosecutor remained silent while Miller testified that no plea arrangement had been made with the state, though he well knew that such an agreement did exist. Not only did the prosecutor allow the jury to be misled as to Miller's reasons for testifying, but by keeping Miller ignorant of the terms of the plea bargain, *he contrived a means of ensuring that this evidence would not come before the jury*. Miller's credibility as a witness was an important issue in the case. Evidence of any understanding or agreement for leniency was relevant to his credibility, and the jury was entitled to know it.
>
> *The fact that Miller was not aware of the exact terms of the plea agreement only increases the significance, for purposes of assessing credibility, of his expectation of favorable treatment* .... a tentative promise of leniency might be interpreted by a witness as contingent upon the nature of his testimony. Thus, there would be greater incentive for the witness to try to make his testimony pleasing to the prosecutor. That a witness may curry favor with a prosecutor by his testimony was demonstrated when the prosecutor negotiated a more favorable plea

agreement with Miller after Campbell was convicted. (Campbell v. Reed, 594 F.2d at p. 7.)

In Willhoite v. Vasquez (9thCir. 1990) 921 F.2d 247, the prosecutor offered Meyer, the accomplice, a lesser charge in exchange for his testimony against defendant Willhoite. This deal was fully disclosed. "As a *side deal*, the district attorney privately agreed with Meyer's attorney that after Meyer testified, the district attorney would support a petition to modify Meyer's sentence to limit the duration of his confinement to time served."Id. at pp. 248-249. This side deal was not disclosed to either Meyer or to the other defendants and their lawyers. Two Ninth Circuit judges believed that this side deal did not require the habeas petition to be granted because the plea agreement that had already been disclosed "provided ample opportunity" for cross-examination and this "additional information would not have assisted the jury in assessing Meyer's credibility." They also found that apart from Myer's testimony there was independent evidence of guilt. (Id. at p. 249.)

Judge Trott[162] agreed only that the "undisclosed inducement" would not have altered the outcome of the trial of this particular case. However, Trott lambasted the prosecutor's behavior in a concurring opinion.

> Why did the prosecutor make a secret 'side deal' with the attorney for [the informant]? Why did the prosecutor not want Meyer himself to know of the hidden benefit to be derived by him from testifying? There is a clear answer to these questions: The prosecutor wanted to deprive the jury and the defendant of information to which they would ordinarily be entitled, i.e., information reflecting on the credibility of a key prosecution witness. Keeping Meyer in the dark permitted him to do that.
>
> My respected colleagues describe this case as involving a simple failure to disclose part of the plea agreement. I see it as more than that: It involves a pernicious scheme without any redeeming features, a scheme that can only spawn unnecessary post-trial motions and appeals when its presence in a case becomes known to the defense. This scheme violates both the letter and spirit of Giglio ....
>
> The prosecutor secretly disguised the real deal to make it appear less sweet than it was, leaving the jury with the false idea that Meyer was to remain in jail notwithstanding his cooperation. That Meyer was kept ignorant in no way mitigates what must be seen as a conscious effort to dupe the jury ....
>
> Our system of justice sanctions 'deals' between prosecutors and codefendants, giving the latter benefits in return for their hopefully truthful testimony. We permit such arrangements because they are necessary to

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[162] The Honorable Stephen Trott has served as Chief Deputy of the Los Angeles County District Attorney's Office, United States Attorney for the Central District of California, and head of the Criminal Division of the United States Department of Justice. He is the author of "Words of Warning for Prosecutors Using Criminals as Witnesses," 47 HASTINGS L.J. (1966).

> pursue serious criminal activity. On whom do we rely to keep the system honest? The jurors, who have the duty to determine the credibility of the witnesses. Plots to keep them ignorant are not appropriate ....
>
> **Prosecutors must not do indirectly what the law absolutely forbids them to do directly, i.e., dress up a witness with a false indicia of credibility.** This is inconsistent with a system of justice that expects integrity from prosecutors, not cheap tricks designed to skirt clear responsibilities. I see no possible permissible purpose to be served by **secret side deals** with witnesses' attorneys. **If we were to sanction such a practice, its existence quickly would become known, and it might become widespread. Eventually it could become internalized. A prosecutor's whisper to a witness's attorney might become a wink to the witness. Witnesses might testify safe in the knowledge they could receive more than promised, and defendants could systematically be deprived of a basis for impeachment** .... ¶ This objectionable practice, is among other things, nothing more than an improper way around the right to confront witnesses. (Wilhoite v. Vasquez, 921 F.2d at p. 252, emphasis added.)

In the capital case of Belmontes v. Brown (9thCir. July 15, 2005) ___ F.3d ___, 2005 U.S. App. LEXIS 14320, codefendant Bolanos pled guilty to second burglary and testified against Belmontes under an immunity agreement. LEXIS [*7]. The prosecutor in Belmontes' case appeared on Bolanos' behalf that resulted in numerous traffic matters either being dismissed or disposed of leniently. LEXIS [*34]. The state failed to disclose any of this and contended that they did not perceive the dismissal of the traffic offenses are related to the immunity deal. LEXIS [*37]. The Ninth Circuit held that

> Here, the fact that the prosecutor personally appeared in municipal court to argue for favorable dispositions of Bolonas' misdemeanor traffic offenses casts a shadow on Bolanos' credibility regardless of whether such intervention was mentioned in the plea agreement or offered as consideration for Bolanos' testimony. Had defense counsel known about the existence and disposition of the misdemeanor offenses, he could have impeached Bolanos by showing that he had a motive to say what the prosecution wanted to hear in the hopes of obtaining a lighter sentence on his plea to second degree burglary. Even though Bolanos was not explicitly promised leniency, the fact that the prosecutor helped Bolanos obtain dismissals on his traffic misdemeanors makes it more likely that he would intercede on Bolanos' behalf when it came time for sentencing on the burglary charge. Thus, the evidence was clearly relevant and admissible for purposes of impeachment, and the district attorney should have disclosed it. (Belmontes, *supra*, 2005 LEXIS 14320 [*39].

CONCLUSION

For the foregoing reasons, the application to file a second or successive petition for writ of habeas corpus should be granted.

Date: December 11, 2005

Respectfully submitted,

VERNA WEFALD

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